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941
No. 2565

United States
Circuit Court of Appeals

For the Ninth Circuit.

ERNEST C. REED,

Appellant,

vs.

THE UNITED STATES OF AMERICA,
CHARLES E. SEBASTIAN, Chief of Police
of the City of Los Angeles, and PATRICK J.
PHELAN, Agent of the State of Iowa,
Appellees.

In the Matter of the Application of ERNEST C.
REED, for a Writ of Habeas Corpus.

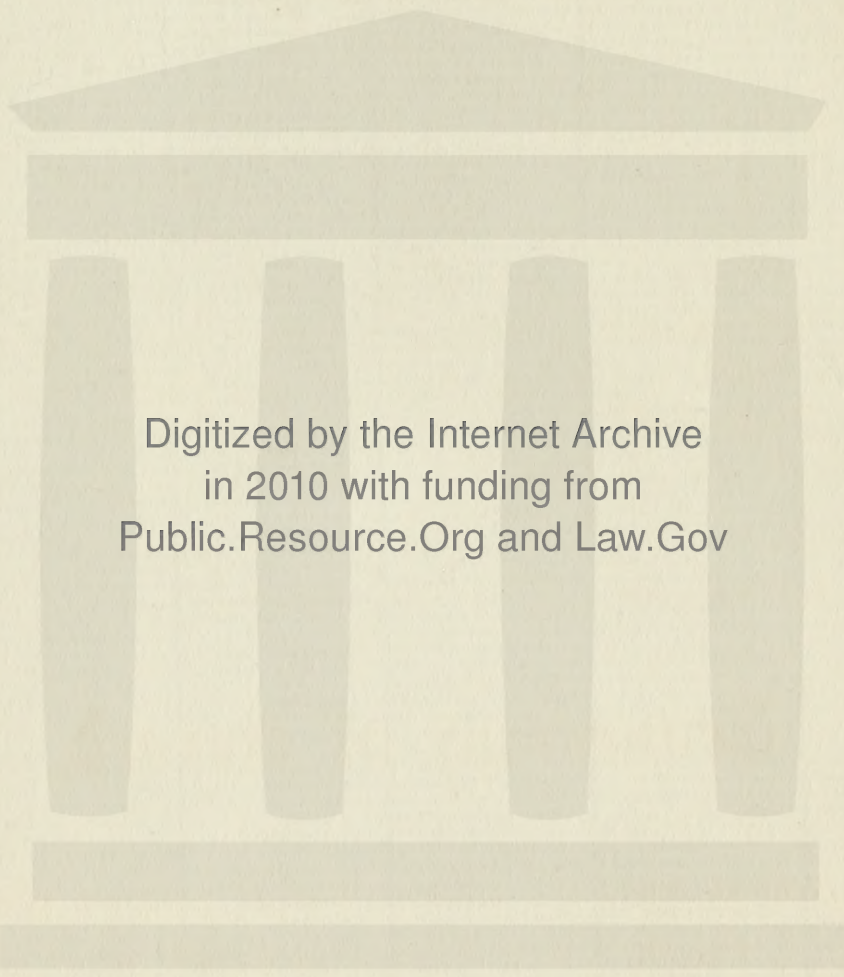
Transcript of Record.

Upon Appeal from the United States District Court for
the Southern District of California,
Southern Division.

Filed

APR 19 1915

F. D. Monckton,
Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.
Clerk.



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the District Court of the United States, Southern
District of California, Southern Division.*

In the Matter of the Application of ERNEST C.
REED for Writ of Habeas Corpus.

**Order Extending Time to Prepare and File Trans-
script on Appeal.**

Good cause being shown therefor from the affidavit and of the said Ernest C. Reed and his examination before the Court, IT IS HEREBY ORDERED that the time for preparing and filing the Transcript on Appeal in the above-entitled matter be and the same is hereby extended ten days from the date hereof, to wit, to and including Thursday, January 28, 1915.

January 18, 1915.

BLEDSON, Jr.,
Judge.

FCC: MGC.

[Endorsed]: No. 899—Crim. In the District Court of the United States, in and for the Southern District of California, Southern Division. In the Matter of the Application of Ernest C. Reed, for Writ of Habeas Corpus. Order Extending Time to Prepare and File Transcript on Appeal. Filed Jan. 18, 1915. Wm. M. Van Dyke, Clerk. By F. F. Green, Deputy.

Names and Addresses of Attorneys.

For Petitioner and Appellant:

Messrs. COLLIER, SHELTON & SCHLEGEL,
811 H. W. Hellman Building, Los Angeles,
California.

For Respondents and Appellees:

PERCY V. HAMMON, Esq., Deputy District
Attorney of Los Angeles County, Los An-
geles, California; and

C. A. STUTSMAN, Esq., 903 California Build-
ing, Los Angeles, California. [3*]

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

No. 899—CRIM.

In the Matter of the Application of ERNEST C.
REED, for a Writ of Habeas Corpus. [4]

*In the United States District Court, Southern Dis-
trict of California, Southern Division.*

In the Matter of the Application of ERNEST C.
REED, for a Writ of Habeas Corpus.

Petition for Writ.

To the Hon. BENJAMIN F. BLEDSOE, Judge of
the United States District Court, Southern Dis-
trict of California, Southern Division:

The Petition of Ernest C. Reed, respectfully
shows: That Ernest C. Reed is imprisoned, detained,

*Page-number appearing at foot of page of original certified Record.

confined and restrained of his liberty by C. E. Sebastian as Chief of Police of the city of Los Angeles in said county, and by Patrick J. Phelan, an agent of the Governor of the State of Iowa, at Los Angeles, in the County of Los Angeles, in the State of California; that the said imprisonment, detention, confinement and restraint are illegal; and that the illegality thereof consists in this, to wit: that said Ernest C. Reed is restrained of his liberty by the said C. E. Sebastian as Chief of Police of the city of Los Angeles and said Patrick J. Phelan as such agent of the Governor of the State of Iowa, under and by virtue of a certain demand for the extradition of the said Ernest C. Reed by the Governor of the State of Iowa founded upon an illegal indictment by the Grand Jury of Scott County, Iowa, and a writ of rendition issued thereon for the apprehension of said Ernest C. Reed by the Honorable Hiram W. Johnson, Governor of the State of California; that affiant is informed and believes and upon such information and belief alleges the fact to be that true copies of all of the papers, pleadings, files, affidavits, certificates and all other documents presented to the Hon. Hiram W. Johnson as Governor of the State of California, or to any one lawfully acting in [5] his place and stead by the State of Iowa or the Governor thereof or any of its or his agents, for the purpose of procuring from said Governor of the State of California, or his lawfully authorized representative, the writ of rendition hereinabove mentioned, are attached hereto as pages 2 to 16 inclusive of Exhibit "A" hereto attached and made a part hereof and that no other

papers, certificates, documents, pleadings or files were presented to or used or acted upon therein by said Governor of the State of California, or his lawfully authorized representative; that said imprisonment and detention of the said Ernest C. Reed by said officers is illegal for the following particular reasons:

I.

That said requisition or demand of the Governor of the State of Iowa is wholly insufficient to authorize or empower the said State of Iowa to ask for the extradition of the said Ernest C. Reed from the State of California or to justify said request or to cause him to be extradited from the State of California to the State of Iowa, and is wholly insufficient to support or justify such request or warrant extradition thereunder for the following reasons, to wit:

(a) That said indictment upon which the same is based, a true copy whereof is attached hereto as pages 5, 6, and 7, of Exhibit "A" hereof and made a part hereof, purporting to have been filed in the District Court of the County of Scott, State of Iowa, on September 25, 1914, is wholly insufficient as an indictment in the following particulars, to wit:

1. That it does not state facts sufficient to constitute a public offense or crime or to charge the said Ernest C. Reed with any crime or public offense.

2. That it does not appear from said indictment that the said Asaph Sergeant was defrauded in any manner or thing whatsoever. [6]

3. That it does not appear that the property alleged as having been obtained from said Ernest C. Reed was of any value whatsoever.

4. That there is no such crime as the crime of false pretenses known to the laws of the State of Iowa.

5. That it cannot be ascertained therefrom whether said indictment seeks to charge the crime of cheating by false pretenses or the crime of felony.

6. That it cannot be determined therefrom whether the said Asaph Sergeant intended to part with the title of said property or thing.

7. That it cannot be ascertained therefrom what, if anything, the said Asaph Sergeant was to receive for the property alleged to have been obtained by the said Ernest C. Reed, and therefore does not contain a material part of the transactions and representations.

8. That it does not appear therefrom from the alleged representation made by the said Ernest C. Reed at what period of time the real property in said indictment described was free and clear of incumbrances, nor when the said Ernest C. Reed owned the property.

9. That it further affirmatively appears that the alleged representation as to warranty was only to be performed in the future and therefore promissory, and was not of a past or existing fact.

10. That the allegation in said indictment contained to the effect that said Ernest C. Reed could not warrant the premises unto the said Asaph Sergeant is a conclusion of law purely and is not a statement of a fact.

(b) That the alleged criminal offense, if any there be, is barred by Section 5165 of the Annotated

Codes of 1897 of the State of Iowa, as follows, to wit:

“THREE YEARS. In all other cases an indictment for public offense must be found within three years after the commission thereof and not afterwards,” [7]

and that the said alleged public offense, if any there be, set forth in said indictment comes within the purview of said section, and the Ernest C. Reed was for more than three years following the conclusion of said alleged offense set forth in said indictment, publicly a resident within the State of Iowa.

(c) That said requisition and said executive warrant issued by the Governor of the State of California should not have been issued for the reason that the said Ernest C. Reed is not now and was not at the time the said requisition and the said Governor's warrant were issued, nor at the time of the finding of said indictment, a fugitive from justice, under Section 5278 United States Revised Statutes.

II.

That the said Ernest C. Reed has not committed any crime and the said process of the State of Iowa is not being used in good faith but is being maliciously used for ulterior purposes to wit, private gain by the said Asaph Sergeant in this, that the said extradition is being used solely and entirely by the said Asaph Sergeant to collect a private debt, to wit, the sum of Twenty-five Hundred Dollars which the said Asaph Sergeant paid or caused to be paid to discharge a vendor's lien upon the real property described in said indictment, and that it is not true that the said process was issued for the purpose of punish-

ing said Ernest C. Reed for any crime as set forth in the affidavits of Vollmer and Sergeant referred to above, but by said process said Sergeant is attempting and will attempt to collect a private debt and said process was obtained by him for that purpose and no other.

WHEREFORE, your petitioner prays that a Writ of Habeas Corpus may be granted, directed to the said C. E. Sebastian as such Chief of Police of the city of Los Angeles aforesaid, and to the said Patrick J. Phelan as such officer of the State of Iowa, [8] commanding them, and each of them, to have the body of said petitioner before your Honor at a time and place to be therein specified to do and receive what shall then and there be considered by your Honor, concerning said Ernest C. Reed together with the time and cause of his detention and said writ and that said Ernest C. Reed may be restored to his liberty.

ERNEST C. REED.

State of California,
County of Los Angeles,—ss.

Ernest C. Reed, being first duly sworn, deposes and says: That he is the petitioner named in the foregoing petition; that he has read the contents thereof, and that the same is true of his own knowledge, except as to such matters as are therein stated upon information or belief, and as to those matters he believes it to be true.

Subscribed and sworn to before me this 17th day of December, 1914.

[Seal]

FRANK C. COLLIER,
Notary Public.

FCC:MGC. [9]

Exhibit "A" [to Petition—Warrant, etc.].

STATE OF CALIFORNIA.

EXECUTIVE DEPARTMENT.

The People of the State of California, to any Sheriff,
Constable, Marshal, or Policeman of this State,
Greeting:

WHEREAS, It has been represented to me by the Governor of the State of Iowa that ERNEST C. REED stands charged with the crime of False Pretenses, committed in the County of Scott, in said State, and that he fled from the justice of that State, and has taken refuge in the State of California, and the said Governor of Iowa having, in pursuance of the Constitution and Laws of the United States, demanded of me that I shall cause the said ERNEST C. REED to be arrested and delivered to PATRICK J. PHELAN, who is authorized to receive him into his custody and convey him back to the said State of Iowa.

AND WHEREAS, the said representation and demand is accompanied by a copy of certificate of prosecuting attorney, copies of indictment and warrant, and affidavits, certified by the Governor of the State of Iowa to be authentic, whereby the said ERNEST C. REED is charged with said crime; and it satisfactorily appearing that the representations of the said Governor of Iowa are true, and that said

ERNEST C. REED is a fugitive from the justice of said State of Iowa.

YOU ARE THEREFORE required to arrest and secure the said ERNEST C. REED, wherever he may be found within this State, and to deliver him into the custody of the said PATRICK J. PHELAN, to be taken back to the state from which he fled, pursuant to the said requisition, he, the said PATRICK J. PHELAN, defraying all costs and expenses incurred in the arrest and securing of the said fugitive.

IN WITNESS WHEREOF, I have hereunto set my hand [10] and caused the Great Seal of the State to be affixed, this, the 30th day of November, in the year of our Lord one thousand nine hundred and fourteen.

[The Great Seal of the State of California.]

HIRAM W. JOHNSON,

Governor of the State of California.

By the Governor: FRANK C. JORDAN,

Secretary of State.

By FRANK H. CANY,

Deputy.

RETURN THIS WRIT TO THE GOVERNOR'S OFFICE, AT SACRAMENTO, CALIFORNIA. (Over)

(On reverse side of sheet:)

State of California,

County of Los Angeles,—ss.

I HEREBY CERIFY, That I have executed the within warrant by arresting the said Ernest C. Reed, the fugitive named therein, and delivering him into

the custody of the said Patrick J. Phelan, the Agent of the State of Iowa, at Los Angeles, Calif., this 4th day of December, 1914.

C. E. SEBASTIAN,
Chief of Police of the city of Los Angeles, California.

I hereby certify that I received the within-named fugitive Ernest C. Reed from C. E. Sebastian, Chief of Police of the city of Los Angeles, in said city, this 4th day of December, 1914.

PATRICK J. PHELAN,
Agent of the State of Iowa. [11]

**[Appointment of Patrick J. Phelan as Agent—
Exhibit to Petition.]**

STATE OF IOWA.

EXECUTIVE DEPARTMENT.

G. W. Clarke, Governor of the State of Iowa, to All
to Whom These Presents Shall Come, Greeting:

KNOW YE That I have appointed, and do hereby
appoint, Patrick J. Phelan, of the County of Scott,
my agent to take and receive from the authorities
of the State of California,

ERNEST C. REED,
fugitive from justice, and to convey him to the State
of Iowa, to be dealt with according to law.

These are therefore to request and require all per-
sons to permit the said agent to receive and secure
the said fugitive and bring him unmolested into this
State, said agent peaceably and lawfully behaving.

The State of Iowa will be at no expense on account
hereof unless the accused be returned to the State,
indicted (if not already so) and tried; nor shall such

expense in any event exceed the sum of Three Hundred Dollars, in addition to fees lawfully paid to officers of other States.

IN WITNESS WHEREOF, I have hereunto set my hand and caused to be affixed the Great Seal of the State of Iowa. Done at Des Moines this 21st day of November, in the year of our Lord one thousand nine hundred and fourteen, of the independence of the United States the one hundred and thirty-ninth.

[Great Seal of the State of Iowa.]

By the Governor: G. W. CLARKE.

W. S. ALLEN,

Secretary of State. [12]

**[Requisition for Apprehension of Fugitive, etc.—
Exhibit to Petition.]**

STATE OF IOWA.

EXECUTIVE DEPARTMENT.

The Governor of the State of Iowa, to His Excellency,
the Governor of California:

Whereas, it appears by the annexed papers which I certify to be authentic and duly authenticated in accordance with the laws of this State, that Ernest C. Reed stands charged by indictment with the crime of False Pretenses committed in the County of Scott, in this State, which I certify to be a crime under the laws of this State, and that he ha— fled from this State and is a fugitive from the justice thereof and it is believed such fugitive ha— taken refuge in the State of California.

Now, Therefore, I, G. W. Clarke, Governor of the State of Iowa, pursuant to the provisions of the Con-

stitution and Laws of the United States, do hereby make requisition for the apprehension of the said fugitive and for his delivery to Patrick J. Phelan, who is hereby authorized to receive and convey him to the State of Iowa, here to be dealt with according to law.

In Testimony Whereof, I have hereunto set my hand and caused to be affixed the Great Seal of the State of Iowa. Done at Des Moines, this 21st day of November, in the year of our Lord one thousand nine hundred and fourteen, of the independence of the United States the one hundred and thirty-ninth.

By the Governor: G. W. CLARKE. (Signed)

W. S. ALLEN. (Signed)

Secretary of State. [13]

APPLICATION FOR REQUISITION.

State of Iowa,
County of Scott,
Office of County Attorney.

November 21, 1914.

To the Govenor of the State of Iowa:

Sir: I herewith make application for a requisition upon the Governor of California for the return of ERNEST C. REED, who is charged in this county with felony, and who, as it appears from the accompanying affidavit, is a fugitive from justice of this State.

In support of this application I send herewith certified copies of the indictment and bench warrant and also affidavits alleging the facts required to be established, and I hereby certify:

1. That the full name of the person for whom extradition is asked is Ernest C. Reed, who stands charged with crime of False Pretenses, and the name of the agent proposed is Patrick J. Phelan, who is a resident of Davenport, in the County of Scott, State of Iowa.

2. That in my opinion the ends of public justice require that the alleged criminal be brought to this State for trial, at the public expense.

3. That I believe I have sufficient evidence to secure the conviction of said fugitive.

4. That the person named as agent is a proper person and that he has no private interest in the arrest of said fugitive.

5. That all papers herein are in duplicate and have been compared with each other, and are in all respects, entirely alike.

6. That this application is not made for the purpose of enforcing the collection of a debt, or for any private purpose whatever; and if the requisition now applied for be granted, the criminal proceedings shall not be used for any of said objects. [14]

(Signed) FRED VOLLMER,

County Attorney.

(Over)

(On reverse side of sheet:)

AFFIDAVIT.

Affidavit [of Fred Vollmer—Exhibit to Petition].

State of Iowa,

County of Scott,—ss.

I, Fred Vollmer, on oath depose and say: That Ernest C. Reed, who is charged with crime of False

Pretenses, committed on or about June 7, 1909, in the County of Scott, has, since the commission of said crime, actually fled from the State of Iowa, the time of his escape being about June 7, 1909, and that he is now a fugitive from justice of this State, and I have reason to believe is at Los Angeles, in the State of California, where he is under arrest awaiting a warrant in this case, and I ask that a requisition be issued on the Governor of the State of California.

(Signed) FRED VOLLMER.

Subscribed and sworn to before me by Fred Vollmer, this 21st day of November, 1914.

F. A. COOPER,

Notary Public Scott Co., Ia.

(With the seal of said notary impressed thereon.) [15]

WM. THEOPHILUS,

Judge of the Seventh Judicial District.

[Indictment—Exhibit to Petition.]

This Bill of Indictment was presented in Open Court in the Presence of the Grand Jury, and by their Foreman, and is now here filed in presence of the Court, and of the Grand Jury, this 25th day of September, A. D. 1914.

H. J. McFARLAND,

Clerk District Court, Scott County, Iowa.

A. C. MARTENS,

Deputy.

No Private Prosecutor.

No. 3280.

THE STATE OF IOWA

vs.

ERNEST C. REED.

A True Bill.

J. G. DUTCHER.

Foreman of the Grand Jury.

Names of witnesses examined before the Grand Jury:

CHAS. SORROWFREE.

ASAPH SERGEANT. [16]

District Court of the County of Scott.

THE STATE OF IOWA

Against

ERNEST C. REED.

The Grand Jury of the County of Scott, in the name and by the authority of the State of Iowa, accuse Ernest C. Reed of the crime of False Pretenses committed as follows:

The said Ernest C. Reed, on or about the 7th day of June, in the year of our Lord one thousand nine hundred and nine in the county aforesaid, did unlawfully, feloniously, designedly, by means of false pretenses and with intent to defraud, obtain from Asaph Sergeant and of the property of said Asaph Sergeant a draft in words and figures substantially as follows:

“LeClaire Savings Bank,

LeClaire, Iowa, June 7, 1909, No. 14742.

Pay to the order of A. Sergeant _____

\$5537.00 fifty-five hundred and thirty-seven dollars

(Nor over six thousand (6000.00)

Payable at

Par in To Iowa National Bank

New York or Davenport, Iowa,

Chicago Exchange.

F. C. MICHAEL.

H. D. G., Cashier.

Endorsed on the back thereof: "Asaph Sergeant," and a certificate of ten shares of stock of the par value of one hundred dollars per share of the America Security Co., a corporation (a better description being to this Grand Jury unknown), by unlawfully, feloniously, designedly, by means of false pretenses and with intent to defraud, represent that the title to all that certain tract or parcel of land in Moore County, Texas, more particularly described as follows: West half of Survey 11, Block Q, certificate 5/814, H. & G. N. R. R. Co., grant 320 acres in the [17] Pan Handle of Texas was clear, that it was unincumbered and that he owned the said land and the title thereto, and that he would warrant all and singular the said premises unto the said Asaph Sergeant against every person lawfully claiming or to claim the same or any part thereof, and each and all of said representations said Asaph Sergeant relied upon and believed.

Whereas in truth and in fact the aforesaid described land in Moore County, Texas, was not clear, and was not unincumbered, and that he did not own the said land and the title thereto and that he could not warrant the premises unto said Asaph Sergeant, and that in truth and in fact said above-described

land in Moore County, Texas, was then and there subject to a vendor's lien of a large amount of money, to wit, about Two Thousand Five Hundred Dollars, all of which was then and there well known to said Ernest C. Reed, contrary to and in violation of law; and the said Grand Jury further alleges that said defendant Ernest C. Reed has not been publicly a resident within the State of Iowa during the period of time from June 7, 1909, until the present time, the date of the return of this indictment.

(Signed) FRED F. VOLLMER,

County Attorney in and for Scott County, Iowa.

[18]

State of Iowa,

Scott County,— ss.

I, H. J. McFarland, Clerk of the District Court of the State of Iowa, in and for said county, do hereby certify that the above and foregoing is a true and perfect transcript of the Record Entry of Bill of Indictment in case No. 3280, The State of Iowa vs. Ernest C. Reed, in the above-entitled cause, as fully as the same remains on record in my office.

And I further certify that the records of said Court are now in my custody and under my control and that I am the proper officer to make this certificate.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at the courthouse in Davenport, in said county, this 20th day of November, A. D. 1914.

(Signed) H. J. McFARLAND,

Clerk of District Court.

(With the seal impressed thereon.) [19]

JUDGE'S AND CLERK'S CERTIFICATE.

State of Iowa,
Scott County,—ss.

*In the District Court of Iowa, in and for Scott
County.*

I, M. F. DONEGAN, one of the judges of the Seventh Judicial District of Iowa, within which is included Scott County, do hereby certify that H. J. McFarland, whose genuine signature is attached to to the foregoing and attached certificate, was at the date thereof, to wit:

November 20th, 1914, the clerk of the District Court in and for Scott County, duly elected, qualified and acting, and the person having by law the custody of the seal of said Court, and that said certificate is in due form.

Witness my hand hereto this 20th day of November, A. D. 1914.

M. F. DONEGAN, (Signed)
Judge Seventh Judicial District.

State of Iowa,
Scott County,—ss.

I, H. J. McFarland, clerk of the District Court within and for Scott County, do hereby certify that Hon. M. F. Donegan, whose genuine signature is affixed to the foregoing certificate, was at the date thereof, to wit, November 20th, 1914, one of the Judges of the District Court of said Judicial District, duly elected, qualified and acting.

WITNESS my hand and the Seal of the Court hereto affixed, at my office in Davenport, in said

county this 20th day of November, 1914.

H. J. McFARLAND,

Clerk of Said Court.

(With the Seal of the District Court impressed thereon.) [20]

Bench Warrant [Exhibit to Petition].

State of Iowa,

Scott County,—ss.

The State of Iowa, to any peace officer in the State:

An indictment having been found in the District Court of said county, on the 25th day of September, A. D. 1914, charging Ernest C. Reed with the crime of False Pretenses, you are therefore hereby commanded to arrest the said Ernest C. Reed and bring him before said Court to answer said Indictment, if the said Court be then in session in said county (or if the said Ernest C. Reed require it, that you take him before a magistrate, or the clerk of the District Court in said county, or in the county in which you arrest him that he may give bail to answer the said indictment; or if the said Court be not then in session in said county, that you deliver him into the custody of the sheriff of said county.

Given under my hand and the seal of said Court, at my office, in the city of Davenport, in the county aforesaid, this 25th day of September, A. D. 1914.

By order of the Judge of the Court.

H. J. McFARLAND,

Clerk of District Court.

[Seal of the District Court of Scott Co., Iowa.]

The defendant is to be admitted to bail in the sum of \$10,000.00 Dollars. [21]

State of Iowa,
Scott County,—ss.

I, H. J. McFarland, Clerk of the District Court of the State of Iowa, in and for said county, do hereby certify that the above and foregoing is a true and perfect transcript of the record entry of BENCH WARRANT issued in case No. 3280, Criminal, State of Iowa vs. Ernest C. Reed, in the above-entitled cause, as fully as the same remains on record in my office.

And I further certify that the records of said court are now in my custody and under my control, and that I am the proper officer to make this certificate.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said court, at the courthouse in Davenport, in said county, this 20th day of November, A. D. 1914.

[Seal] (Signed) H. J. McFARLAND,
Clerk of District Court. [22]

JUDGE'S AND CLERK'S CERTIFICATE.

State of Iowa,
Scott County,—ss.

In the District Court of Iowa, in and for Scott County.

I, WM. THEOPHILUS, one of the judges of the Seventh Judicial District of Iowa, within which is enclosed Scott County, do hereby certify that H. J. McFarland, whose genuine signature is attached to

the foregoing and attached certificate was at the date thereof, to wit: November 20th, 1914, the clerk of the District Court in and for Scott County, duly elected, qualified, and acting, and the person having by law the custody of the seal of said Court, and that said certificate is in due form.

WITNESS my hand hereto this 20th day of November, A. D. 1914.

WM. THEOPHILUS, (Signed)

Judge Seventh Judicial District.

State of Iowa,

Scott County,—ss.

I, H. J. McFarland, Clerk of the District Court, within and for Scott County, do hereby certify that Hon. Wm. Theophilus, whose genuine signature is affixed to the foregoing certificate, was at the date thereof, to wit, November 20th, A. D. 1914, one of the judges of the District Court of said judicial district, duly elected, qualified and acting.

WITNESS my hand and the seal of the Court hereto affixed, at my office in Davenport, in said county, this 20th day of November, 1914.

H. J. McFARLAND,

Clerk of Said Court.

(With the Seal of the District Court impressed thereon.) [23]

[Affidavit of Asaph Sergeant—Exhibit to Petition.]

*In the District Court of the State of Iowa, in and for
Scott County.*

STATE OF IOWA

against

ERNEST C. REED.

State of Iowa,

Scott County,—ss.

I, Asaph Sergeant, being duly sworn on oath states: That I reside in LeClaire, Scott County, Iowa, and that I am the principal complaining witness in the above-entitled cause; that this application for requisition upon the Governor of California for the return of Ernest C. Reed is made in good faith, for the sole purpose of punishing the accused, and that I do not desire or expect to use the prosecution for the purpose of collecting a debt or for any private purpose and will not directly or indirectly use the same for any of said purposes. I further state that said Ernest C. Reed has been absent from the State of Iowa since June 7, 1909. That I did not discover the fact that Ernest C. Reed had committed a crime in connection with the transaction that occurred on said date until I had the title examined to the property in question which was a long time after said date and that since the discovery of said crime I have been endeavoring to locate said Ernest C. Reed and that on or about November 20, 1914, I learned that he was in Los Angeles, California, and that this is the cause for

the delay in making the application for the requisition.

(Signed) ASAPH SERGEANT.

Signed and sworn to before me this 21st day of November, 1914.

WM. THEOPHILUS, (Signed)

Judge of the District Court of Iowa in and for the Seventh Judicial District of Said State. [24]

JUDGE'S AND CLERK'S CERTIFICATE.

State of Iowa,

Scott County.

In the District Court of Iowa, in and for Scott County.

I, WM. THEOPHILUS, one of the judges of the Seventh Judicial District of Iowa, within which is included Scott County, do hereby certify that H. J. McFarland whose genuine signature is attached to the foregoing and attached certificate, was at the date thereof, to wit: November 21st, 1914, the clerk of the District Court in and for Scott County, duly elected, qualified and acting, and the person having by law the custody of the Seal of said Court and that said certificate is in due form.

WITNESS my hand hereto this 21st day of November, A. D. 1914.

(Signed) WM. THEOPHILUS,

Judge Seventh Judicial District.

State of Iowa,

Scott County,—ss.

I, H. J. McFarland, Clerk of the District Court with and for Scott County, do hereby certify that

Hon. Wm. Theophilus, whose genuine signature is affixed to the foregoing certificate, was at the date thereof, to wit: November 21st, A. D. 1914, one of the judges of the District Court of said Judicial District, duly elected, qualified and acting.

WITNESS my hand and the seal of the Court hereto affixed at my office in Davenport, in said county, this 21st day of November, 1914.

H. J. McFARLAND, (Signed)

Clerk of Said Court.

(With seal of said court impressed thereon.)

[25]

**[Instructions Relative to Application—Exhibit to
Petition.]**

**ALL PAPERS MUST BE IN DUPLICATE, AP-
PLICATION MUST BE MADE BY COUNTY
ATTORNEY.**

When the application is based upon indictment the application must be accompanied by duly attested copy of the indictment.

When application is based upon information the application must be accompanied by certified copies of the information and warrant of arrest certified to by the magistrate and the genuineness of his signature; and such information must be supported and accompanied by affidavit or affidavits, sworn to before the magistrate (a notary public is not a magistrate within the meaning of the statute) by some person or persons having knowledge, setting forth the details of the commission of the crime.

In all cases of fraud, false pretenses, embezzle-

ment or forgery, the affidavit of the principal complaining witness or informant, that the application is made in good faith, for the sole purpose of punishing the accused and that he does not desire or expect to use the prosecution for the purpose of collecting a debt, or for any private purpose, and will not directly or indirectly use the same for any of said purposes, should accompany the application, whether based on indictment or information.

An affidavit should also accompany the application even though based on indictment where requisition is made upon the State of Pennsylvania, and the crime is that of seduction.

If there has been any former application for a requisition for the same person, growing out of the same transaction, it should be so stated, with an explanation of the reason for a second request, together with the date of such application as near as may be.

If the offense charged is not of recent occurrence a satisfactory reason should be given for the delay in making the application. [26]

State of California,
County of Sacramento,—ss.

I, Martin C. Madsen, Executive Secretary of Hiram W. Johnson, Governor of the State of California, do hereby certify that the foregoing are full, true and correct copies of all the records, files and documents presented by the Governor of the State of Iowa to the Hon. Hiram W. Johnson as Governor of the State of California, in the matter of the requisition of the Governor of the State of Iowa for Ernest C. Reed, charged with the crime of False Pretenses,

and I further certify that the foregoing are all the records, files and documents upon which the said Hiram W. Johnson as said Governor acted in issuing the writ of rendition herein.

In Witness Whereof, I have hereunto set my hand this 14th day of December, 1914.

MARTIN C. MADSEN,
Executive Secretary of the Governor of the State of
California.

State of California,
County of Sacramento,—ss.

On this 14th day of December, 1914, before me, Myrtle V. Murray, a Notary Public in and for said county, residing therein, duly commissioned and sworn, personally appeared Martin C. Madsen, known to me to be the executive secretary to the Governor of the State of California, and the person who executed the foregoing certificate, and acknowledged to me that as such executive secretary he executed the same.

Witness my hand and official seal.

MYRTLE V. MURRAY,
Notary Public in and for the Co. of Sacramento,
State of Cal. [27]

[Endorsed]: No. 899—Crim. In the District Court of the United States, in and for the Southern District of California, Southern Division. In the Matter of the Application of Ernest C. Reed for Writ of Habeas Corpus. Petition for Writ. Filed Dec. 17, 1914, at 35 min. past 10 o'clock A. M. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy.

Collier, Shelton & Schlegel, 811 Herman W. Hellman Building, Sunset, Main 9480, Home A4201, Los Angeles, California, Attorneys for Petitioner. [28]

In the United States District Court, Southern District of California, Southern Division.

In the Matter of the Application of ERNEST C. REED, for Writ of Habeas Corpus.

Order for Issuance of Writ of Habeas Corpus.

Upon reading and filing the petition of Ernest C. Reed for Writ of Habeas Corpus and good cause appearing therefrom therefor, IT IS HEREBY ORDERED that a Writ of Habeas Corpus issue thereon as prayed for, returnable before me December 18th, 1914, at 10 A. M.

Dated December 17th, 1914.

[Seal] BENJAMIN F. BLEDSOE,
Judge of the United States District Court, in and for
the Southern District of California, Southern
Division
JS:MGC.

[Endorsed]: No. 899—Crim. In the District Court of the United States, in and for the Southern District of California, Southern Division. In the Matter of the Application of Ernest C. Reed for Writ of Habeas Corpus. Order for Issuance of Writ of Habeas Corpus. Filed Dec. 17, 1914, at 35 min. past 10 o'clock A. M. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Collier, Shelton & Schlegel, 811 Herman W. Hellman Building,

Sunset Main 9480, Home A4201, Los Angeles, California, Attorneys for Petitioner. [29]

In the United States District Court, Southern District of California, Southern Division.

United States of America,
Southern District of California,
Southern Division.

Writ of Habeas Corpus.

To C. E. Sebastian, Chief of Police of the City of Los Angeles, and to Patrick J. Phelan, an Officer of the State of Iowa, Representing the Governor of Said State, Greeting:

We command you that you have the body of Ernest C. Reed by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name said Ernest C. Reed shall be called or charged, before BENJAMIN F. BLEDSOE, Judge of said District Court of the United States, in and for the Southern District of California, at Los Angeles, in the said District and Division, on December 18th, 1914, at 10:00 A. M., to do and receive what shall then and there be considered concerning the said Ernest C. Reed.

And have you then and there this writ.

WITNESS, Hon. BENJAMIN F. BLEDSOE, Judge of the said District Court, at the courtroom thereof, in the said District, this 17th day of December, 1914.

ATTEST, my hand and the seal of said Court, the day and year last above written.

[Seal]

WM. M. VAN DYKE,

Clerk.

By Chas. N. Williams.

JS:MGC.

MARSHAL'S RETURN.

I personally served copy of within Writ on C. E. Sebastian and Patrick J. Phelan this 17th day of Dec., 1914, at Los Angeles, Calif.

C. T. WALTON,

U. S. Marshal.

By J. F. Durlin,

Deputy. [30]

[Endorsed]: Marshal's Criminal Docket No. 5968. No. 899—Crim. In the District Court of the United States, in and for the Southern District of California, Southern Division. In the Matter of the Application of Ernest C. Reed for Writ of Habeas Corpus. Writ of Habeas Corpus. Filed Dec. 17, 1914, at 30 min. past 11 o'clock A. M. Wm. M. Van Dyke, Clerk. Murray C. White, Deputy. Collier, Shelton & Schlegel, 811 Herman W. Hellman Building, Sunset, Main 9480, Home A4201, Los Angeles, California, Attorneys for Petitioner. [31]

[Order Admitting Ernest C. Reed to Bail.]

In the United States District Court, Southern District of California, Southern Division.

In re the Application of ERNEST C. REED for a Writ of Habeas Corpus.

It is hereby ordered that the said Ernest C. Reed be admitted to bail in the sum of \$5,000.00, to be given by two good and sufficient sureties to be approved by a U. S. Commissioner, and when so approved, the said Reed be released.

Dated December 17th, 1914.

BENJAMIN F. BLEDSOE,
Judge.

[Endorsed]: No. 899—Crim. U. S. District Court, Southern District of California, Southern Division. In re Application of Ernest C. Reed for Writ of Habeas Corpus. Order Fixing Bail. Filed Dec. 17, 1914. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. [32]

In the District Court of the United States in and for the Southern District of California, Southern Division.

In the Matter of the Application of ERNEST C. REED, for a Writ of Habeas Corpus.

Return on Writ of Habeas Corpus.

To the Honorable Benjamin F. Bledsoe, Judge of the United States District Court, Southern District of California, Southern Division:

I, Charles E. Sebastian, Chief of Police of the city

of Los Angeles, hereby make my return in the above-entitled matter:

That on the 4th day of December, 1914, I arrested the within named ERNEST C. REED on an extradition warrant of arrest and rendition issued by his Excellency Hiram W. Johnson, Governor of the State of California on the 20th day of November, 1914, commanding the arrest of the said ERNEST C. REED as a fugitive from justice from the State of Iowa, and the delivery of him, the said ERNEST C. REED into the custody of Patrick J. Phelan named within said extradition warrant as the agent of the State of Iowa. That I delivered the said ERNEST C. REED into the custody of the said Patrick J. Phelan, agent of the State of Iowa in this city of Los Angeles, on the said 4th day of December, 1914, but immediately after said arrest and delivery on the said 4th day of December, 1914, while the said ERNEST C. REED though technically in the custody of Patrick J. Phelan, agent of the State of Iowa, was still actually in my custody, a Writ of Habeas Corpus issued from the Superior Court in and for the County of Los Angeles, State of California, was served upon me, C. E. Sebastian, Chief of Police of the city of Los Angeles, and the said Patrick J. Phelan, [33] agent of the State of Iowa, on application of the said ERNEST C. REED and made returnable before the Hon. Gavin W. Craig, Judge of said Superior Court on the 9th day of December, 1914. That I, C. E. Sebastian, Chief of Police of the city of Los Angeles, and the said Patrick J. Phelan, agent of the State of Iowa, jointly made return on said writ to

the Hon. Gavin W. Craig, judge as aforesaid, but that hearing of said matter was finally had before the Hon. Frank R. Willis, Judge of said Superior Court on the 12th day of December, 1914, when the writ was dismissed and the said prisoner ERNEST C. REED remanded into the custody of the said Patrick J. Phelan, agent of the State of Iowa in the said extradition.

That immediately thereafter, to wit, in the forenoon of the 12th day of December, 1914, and while officers of my department were aiding the said Patrick J. Phelan, Agent of the State of Iowa, in the detention of the said prisoner ERNEST C. REED, a writ of habeas corpus issued from the District Court of Appeal in and for the Second District, State of California, by the Hon. W. P. James, Presiding Justice of said court, and upon application of the said ERNEST C. REED, was served upon me, C. E. Sebastian, Chief of Police of the city of Los Angeles, and the said Patrick J. Phelan, Agent of the State of Iowa, returnable at 2 o'clock, P. M. of the said 12th day of December, 1914.

That I, C. E. Sebastian, Chief of Police as aforesaid, and the said Patrick J. Phelan, Agent of the State of Iowa, jointly made return on said writ of habeas corpus to the Hon. W. P. James, Presiding Justice as aforesaid, on the afternoon of the said 12th day of December, 1914, but that hearing of said matter was continued until the forenoon of the 17th day of December, 1914, when upon hearing said writ of habeas corpus was dismissed by the Hon. W. P. James, Presiding Justice of said court and the said prisoner ERNEST C. REED remanded [34] into

the custody of the said Patrick J. Phelan, Agent of the State of Iowa in the said extradition.

That immediately thereafter, to wit, in the forenoon of the 17th day of December, 1914, the writ of habeas corpus issuing from the United States District Court in and for the Southern District of California, Southern Division, on petition of the said ERNEST C. REED, in the matter pending, was served upon me, Charles E. Sebastian, Chief of Police as aforesaid, and the said Patrick J. Phelan, Agent of the State of Iowa in said extradition, and that immediately following service of said writ I had delivered into my hands a certified copy of the order made in the said United States District Court, Southern District of California, Southern Division, admitting the said ERNEST C. REED, to bail pending the hearing of said writ and certificate of William M. Van Dyke, Clerk of said court, that the bond required to be given on said order had been duly approved, said order admitting to bail and certificate of giving of bond being in words and figures as follows:

“In the United States District Court, Southern District of California, Southern Division.

In Re the Application of ERNEST C. REED, for
Writ of Habeas Corpus.

It is hereby ordered that the said Ernest C. Reed be admitted to bail in the sum of \$5000.00 to be given by two good and sufficient sureties to be approved by a U. S. Commissioner and when so approved the said Reed be released.

Dated December 17th, 1914.

BENJAMIN F. BLEDSOE,

Judge.

[Endorsed]: No. 899—Crim. U. S. District Court, Southern District of California, Southern Division. In Re Application of Ernest C. Reed for Writ of Habeas Corpus. Order [35] Fixing Bail Filed Dec. 17, 1914. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk.

I, Wm. M. Van Dyke, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing to be a full, true and correct copy of an order admitting to bail, made and filed December 17, 1914, in the Matter of the Application of Ernest C. Reed for Writ of Habeas Corpus, No. 899—Crim. S. D. as the same remains on file in my office, and I do further certify that the Bond required to be given in said order has been duly approved by Chas. N. Williams, a U. S. Commissioner, and filed in my office on this 17th day of December, 1914.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 17th day of December, A. D., 1914.

[Seal of the U. S. District Court, Southern District of California.]

WM. M. VAN DYKE,

Clerk.

By Leslie S. Colyer,

Deputy Clerk."

That immediately upon receipt of said order admitting the said ERNEST C. REED to bail, and cer-

tificate that the bond required had been duly approved and filed, I discharged the said ERNEST C. REED from custody and have not since said hour and date had him in my custody, and in consequence cannot bring the body of the said ERNEST C. REED before your Honorable Court on the day and hour that I am within commanded.

I have attached hereto and make a part of this return a full, true and correct copy of the warrant of arrest and rendition in the extradition of the said ERNEST C. REED to the State of Iowa, with my return and the receipt of the said Patrick J. Phelan, agent of the State of Iowa endorsed thereon; also full, [36] true and correct copies of the extradition request made by the authorities of the State of Iowa upon his Excellency the Governor of the State of California as same are certified by Martin C. Madsen, Executive Secretary of the State of California, and I also submit herewith for the inspection of the Honorable Court the original of the said extradition warrant; the certified copies of all papers in the said extradition of ERNEST C. REED from the State of California to the State of Iowa, as same were received by me from the said Martin C. Madsen, Executive Secretary as aforesaid, and the certified copy of order admitting the said ERNEST C. REED to bail pending the hearing of the writ in this matter, which was served upon me and by virtue of which I discharged the said ERNEST C. REED from custody.

Dated December 18, 1914.

C. E. SEBASTIAN,
Chief of Police of the City of Los Angeles, State of
California.

I, Patrick J. Phelan, agent of the State of Iowa, in the extradition of Ernest C. Reed, hereby certify that the foregoing is a full, true and correct return of the action had in said matter. I attach hereto a copy of my commission issued by his Excellency G. W. Clark, Governor of the State of Iowa, appointing me as agent of the said State of Iowa in said extradition and the original of said commission I also submit herewith for the inspection of the Honorable Court.

Dated December 18, 1914.

PATRICK J. PHELAN,
Agent of the State of Iowa in the Extradition of
Ernest C. Reed. [37]

**[Exhibits Attached to Return on Writ of Habeas
Corpus.]**

(COPY)

STATE OF CALIFORNIA,
EXECUTIVE DEPARTMENT.

The People of the State of California, to Any Sheriff,
Constable, Marshal, or Policeman of This State,
Greeting:

WHEREAS, it has been represented to me by the Governor of the State of Iowa that ERNEST C. REED stands charged with the crime of False Pretenses, committed in the County of Scott, in said State, and that he fled from the justice of that State,

and has taken refuge in the State of California, and the said Governor of Iowa having, in pursuance of the Constitution and Laws of the United States, demanded of me that I shall cause the said ERNEST C. REED to be arrested and delivered to PATRICK J. PHELAN, who is authorized to receive him into his custody and convey him back to the said State of Iowa.

AND WHEREAS, the said representation and demand is accompanied by a copy of certificate of prosecuting attorney, copies of indictment and warrant, and affidavits, certified by the Governor of the State of Iowa to be authentic, whereby the said ERNEST C. REED is charged with said crime and it satisfactorily appearing that the representations of the said Governor of Iowa are true and that said ERNEST C. REED is a fugitive from the justice of said State of Iowa.

YOU ARE THEREFORE required to arrest and secure the said ERNEST C. REED, wherever he may be found within this State, and to deliver him into the custody of the said PATRICK J. PHELAN, to be taken back to the State from which he fled, pursuant to the said requisition, he, the said PATRICK J. PHELAN, defraying all costs and expenses incurred in the arrest and securing of the said fugitive.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Great Seal of the [38] State to be affixed, this, the 30th day of November,

in the year of our Lord one thousand nine hundred and fourteen.

[The Great Seal of the State of California.]

HIRAM W. JOHNSON,

Governor of the State of California.

By the Governor: FRANK C. JORDAN,

Secretary of State.

By FRANK H. CANY,

Deputy.

RETURN THIS WRIT TO THE GOVERNOR'S
OFFICE, AT SACRAMENTO, CALIFORNIA.

(OVER)

(On reverse side of sheet:) (Copy).

State of California,

County of Los Angeles,—ss.

I hereby certify, That I have executed the within warrant by arresting the said Ernest C. Reed, the fugitive named therein, and delivering him into the custody of the said Patrick J. Phelan, the agent of the State of Iowa, at Los Angeles, Calif., this 4th day of December, 1914.

C. E. SEBASTIAN,

Chief of Police of the City of Los Angeles, California.

I hereby certify that I received the within-named fugitive Ernest C. Reed, from C. E. Sebastian, Chief of Police of the City of Los Angeles, in said City, this 4th day of December, 1914.

PATRICK J. PHELAN,

Agent of the State of Iowa. [39]

(COPY)

STATE OF IOWA.

EXECUTIVE DEPARTMENT.

G. W. Clarke, Governor of the State of Iowa, to All
to Whom These Presents Shall Come, Greeting:

KNOW YE: That I have appointed, and do hereby
appoint, Patrick J. Phelan, of the County of Scott,
my agent to take and receive from the authorities of
the State of California,

ERNEST C. REED,

fugitive from justice, and to convey him to the State
of Iowa, to be dealt with according to law.

These are therefore to request and require all per-
sons to permit the said agent to receive and secure
the said fugitive and bring him unmolested into this
State, said agent peaceably and lawfully behaving.

The State of Iowa will be at no expense on account
hereof unless the accused be returned to the State,
indicted (if not already so), and tried; nor shall such
expense in any event exceed the sum of Three Hun-
dred Dollars, in addition to fees lawfully paid to offi-
cers of other States.

IN TESTIMONY WHEREOF: I have hereunto
set my hand and caused to be affixed the Great Seal
of the State of Iowa. Done at Des Moines this 21st
day of November, in the year of our Lord one thou-
sand nine hundred and fourteen, of the independence
of the United States the one hundred and thirty-
ninth.

(Great Seal of the State of Iowa.)

By the Governor:

G. W. CLARKE,

W. S. ALLEN,

Secretary of State. [40]

COPY.

I hereby certify that the within and foregoing is a true and exact copy of the papers in the matter of the extradition of Ernest C. Reed from the State of California to the State of Iowa on file in this office.

Dated: Sacramento, Cal., December 3, 1914.

MARTIN C. MADSEN,

Executive Secretary to the Governor.

On this 3d day of December, 1914, before me, Myrtle V. Murray, a notary public in and for the County of Sacramento, residing therein, duly commissioned and sworn, personally appeared Martin C. Madsen, Executive Secretary to the Governor, whose name is subscribed to the foregoing certificate and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office in the County of Sacramento, the day and year in this certificate first above written.

MYRTLE V. MURRAY,

Notary Public in and for the County of Sacramento,
State of California.

(With the seal of the Notary Public impressed thereon, thus:)

“NOTARY PUBLIC,

Eureka,

Sacramento County,

Calif.” [41]

[Application for Requisition—Exhibit to Return.]

COPY.

APPLICATION FOR REQUISITION.

November 21, 1914.

State of Iowa,
County of Scott,
Office of County Attorney.

To the Governor of the State of Iowa:

Sir: I herewith make application for a requisition upon the Governor of California for the return of ERNEST C. REED who is charged in this county with felony, and who, as it appears from the accompanying affidavit, is a fugitive from justice of this state.

In support of this application I send herewith certified copies of the indictment and bench warrant and also affidavits alleging the facts required to be established, and I hereby certify:

1. That the full name of the person for whom extradition is asked is ERNEST C. REED, who stands charged with the crime of False Pretenses; and the name of the agent proposed is Patrick J. Phelan, who is a resident of Davenport, in the County of Scott, State of Iowa.

2. That in my opinion the ends of public justice require that the alleged criminal be brought to this state for trial, at the public expense.

3. That I believe I have sufficient evidence to secure the conviction of said fugitive.

4. That the person named as agent is a proper person and that he has no private interest in the

arrest of said fugitive.

5. That all papers herein are in duplicate and have been compared with each other, and are, in all respects, entirely alike.

6. That this application is not made for the purpose of enforcing the collection of a debt, or for any private purpose [42] whatever; and if the requisition now applied for be granted, the criminal proceedings shall not be used for any of said objects.

(Signed) FRED VOLLMER,
County Attorney.

(Over.)

(On reverse side of sheet:)

COPY.

Affidavit [of Fred Vollmer—Exhibit to Return.]

State of Iowa,

County of Scott,—ss.

I, Fred Vollmer, on oath depose and say: That Ernest C. Reed who is charged with the crime of False Pretenses committed on or about June 7, 1909, in the County of Scott, has, since the commission of said crime, actually fled from the State of Iowa, the time of his escape being about June 7, 1909, and that he is now a fugitive from justice of this state, and I have reason to believe is at Los Angeles, in the State of California, where he is under arrest awaiting a warrant in this case, and I ask that a requisition be issued on the Governor of the State of California.

(Signed) FRED VOLLMER.

Subscribed and sworn to before me by Fred Vollmer this 21st day of November, 1914.

F. A. COOPER,

Notary Public, Scott Co., Ia.

(With the seal of said Notary impressed thereon.)

[43]

WM. THEOPHILUS,

Judge of the Seventh Judicial District.

[Indictment—Exhibit to Return.]

COPY.

This Bill of Indictment was presented in open court in the presence of the Grand Jury, and by their Foreman, and is now here filed in presence of the Court, and of the Grand Jury, this 25th day of September, A. D. 1914.

H. J. McFARLAND,

Clerk District Court, Scott County, Iowa.

A. C. MARTENS,

Deputy.

No Private Prosecutor.

COPY.

No. 3280.

THE STATE OF IOWA

vs.

ERNEST C. REED.

A True Bill.

J. G. DUTCHER,

Foreman of the Grand Jury.

Names of witnesses examined before the Grand Jury:

CHAS. SORROWFREE,

ASAPH SERGEANT. [44]

COPY.

District Court of the County of Scott.

THE STATE OF IOWA

Against

ERNEST C. REED.

The Grand Jury of the County of Scott, in the name and by the authority of the State of Iowa, accuse Ernest C. Reed, of the crime of False Pretenses committed as follows:

The said Ernest C. Reed on or about the 7th day of June, in the year of our Lord one thousand nine hundred and nine in the County aforesaid, did unlawfully, feloniously, designedly, by means of false pretenses and with intent to defraud, obtain from Asaph Sergeant and of the property of said Asaph Sergeant a draft in words and figures substantially as follows:

“LeClaire Savings Bank.

LeClaire, Iowa, June 7, 1909. No. 14742.

Pay to the order of A. Sergeant.....\$5,537.00
Fifty-five hundred and thirty-seven dollars (Not over six thousand \$6,000).

Payable at

Par in To Iowa National Bank.

New York or Davenport, Iowa.

Chicago Exchange.

F. C. MICHAEL.

H. D. G.,

Cashier.

Endorsed on the back thereof, “Asaph Sergeant,” and a certificate of ten shares of stock of the par

value of one hundred dollars per share of the American Security Co., a corporation (a better description being to this Grand Jury unknown), by unlawfully, feloniously, designedly, by means of false pretenses, and with intent to defraud, represent that the title to all that certain tract or parcel of land in Moore County, Texas, more particularly described as follows: West half of Survey 11, Block Q, Certificate 5/814, H. & G. [45] N. R. R. Co., grant 320 acres in the Pan Handle of Texas was clear, that it was unincumbered *and*

COPY.

and that he owned the said land and the title thereto and that he would warrant all and singular the said premises unto the said Asaph Sergeant against every person lawfully claiming or to claim the same or any part thereof, and each and all of said representations said Asaph Sergeant relied upon and believed.

Whereas in truth and in fact the aforesaid described land in Moore County, Texas, was not clear, and was not unincumbered, and that he did not own the said land and the title thereto and that he could not warrant the premises unto said Asaph Sergeant, and that in truth and in fact said above-described land in Moore County, Texas, was then and there subject to a vendor's lien of a large amount of money, to wit, about Two Thousand Five Hundred Dollars, all of which was then and there well known to said Ernest C. Reed, contrary to and in violation of law; and the said Grand Jury further alleges that said defendant Ernest C. Reed has not been publicly a resident within the State of Iowa during the period

of time from June 7, 1909, until the present time, the date of the return of this indictment.

(Signed) FRED VOLLMER,
County Attorney in and for Scott County, Iowa.
[46]

COPY.

State of Iowa,
Scott County,—ss.

I, H. J. McFarland, Clerk of the District Court of the State of Iowa, in and for said county, do hereby certify that the above and foregoing is a true and perfect transcript of the Record Entry of Bill of Indictment in case No. 3280, The State of Iowa vs. Ernest C. Reed, in the above-entitled cause, as fully as the same remains on record in my office.

And I further certify that the records of said court are now in my custody and under my control and that I am the proper officer to make this certificate.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said court, at the courthouse in Davenport, in said county this 20th day of November, A. D. 1914.

(Signed) H. J. McFARLAND,
Clerk of District Court.

(With the seal impressed thereon.) [47]

COPY.

JUDGE'S AND CLERK'S CERTIFICATE.

State of Iowa,
Scott County,—ss.

*In the District Court of Iowa, in and for Scott
County.*

I, M. F. DONEGAN, one of the Judges of the Seventh Judicial District of Iowa, within which is included Scott County, do hereby certify that H. J. McFARLAND, whose genuine signature is attached to the foregoing and attached certificate, was at the date thereof, to wit:

November 20th, 1914, the Clerk of the District Court in and for Scott County, duly elected, qualified and acting, and the person having by law the custody of the seal of said court, and that said certificate is in due form.

Witness my hand hereto this 20th day of November, A. D. 1914.

M. F. DONEGAN, (Signed)
Judge Seventh Judicial District.

State of Iowa,
Scott County,—ss.

I, H. J. McFarland, Clerk of the District Court within and for Scott County, do hereby certify that Hon. M. F. Donegan, whose genuine signature is affixed to the foregoing certificate, was at the date thereof, to wit: November 20th, A. D. 1914, one of the Judges of the District Court of said Judicial District, duly elected, qualified and acting.

WITNESS my hand and the seal of the Court

hereto affixed, at my office in Davenport, in said county this 20th day of November, 1914.

H. J. McFARLAND,
Clerk of Said Court.

(With the Seal of the District Court impressed thereon.) [48]

Bench Warrant [Exhibit to Return].

COPY.

State of Iowa,
Scott County,—ss.

The State of Iowa, to any Peace Officer in the State:

An Indictment having been found in the District Court of said county, on the 25th day of September, A. D. 1914, charging Ernest C. Reed with the crime of False Pretenses, you are therefore hereby commanded to arrest the said Ernest C. Reed and bring him before said court to answer said Indictment, if the said court be then in session in said county (or if the said Ernest C. Reed require it, that you take him before a Magistrate, or the clerk of the District Court in said county, or in the county in which you arrest him that he may give bail to answer the said Indictment; or if the said court be not then in session in said county, that you deliver him into the custody of the sheriff of said county).

Given under my hand and the seal of said court, at my office, in the city of Davenport, in the county aforesaid, this 25th day of September, A. D. 1914.

By order of the Judge of the Court.

H. J. McFARLAND,
Clerk of District Court.

[Seal of the District Court of Scott Co., Iowa.]

The defendant is to be admitted to bail in the sum of \$100,000.00.—Dollars. [49]

COPY.

State of Iowa,
Scott County,—ss.

I, H. J. McFarland, Clerk of the District Court of the State of Iowa, in and for the said county, do hereby certify that the above and foregoing is a true and perfect transcript of the Record Entry of Bench Warrant issued in case No. 3280 Criminal, State of Iowa, vs. Ernest C. Reed, in the above-entitled cause, as fully as the same remains on record in my office.

And I further certify that the records of said court are now in my custody and under my control and that I am the proper officer to make this certificate.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said court, at the courthouse in Davenport, in said county, this 20th day of November, A. D. 1914.

[Seal] H. J. McFARLAND, (Signed)
Clerk of District Court. [50]

COPY.

JUDGE'S AND CLERK'S CERTIFICATE.

State of Iowa,
Scott County,—ss.

*In the District Court of Iowa, in and for Scott
County.*

I, WM. THEOPHILUS, one of the Judges of the Seventh Judicial District of Iowa, within which is included Scott County, do hereby certify that H. J. McFarland, whose genuine signature is attached

to the foregoing and attached certificate, was, at the date thereof, to wit, November 20th, 1914, the clerk of the District Court in and for Scott County, duly elected, qualified and acting, and the person having by law the custody of the seal of said court, and that said certificate is in due form.

WITNESS my hand hereto this 20th day of November, A. D. 1914.

WM. THEOPHILUS, (Signed)
Judge Seventh Judicial District.

State of Iowa,
Scott County,—ss.

I, H. J. McFarland, Clerk of the District Court within and for Scott County, do hereby certify that Hon. Wm. Theophilus, whose genuine signature is affixed to the foregoing certificate, was at the date thereof, to wit, November 20th, A. D. 1914, one of the Judges of the District Court of said Judicial District, duly elected, qualified and acting.

WITNESS, my hand and the seal of the Court hereto affixed, at my office in Davenport, in said county, this 20th day of November, 1914.

H. J. McFARLAND,
Clerk of Said Court.

(With the Seal of the District Court impressed thereon.) [51]

[Affidavit of Asaph Sergeant—Exhibit to Return.]

COPY.

*In the District Court of the State of Iowa in and for
Scott County.*

STATE OF IOWA

Against

ERNEST C. REED.

State of Iowa,
Scott County,—ss.

I, Asaph Sergeant, being duly sworn on oath state:
That I reside in LeClaire, Scott County, Iowa, and
that I am the principal complaining witness in the
above-entitled cause; that this application for a
requisition upon the Governor of California for the
return of Ernest C. Reed is made in good faith, for
the sole purpose of punishing the accused and that
I do not desire or expect to use the prosecution for
the purpose of collecting a debt or for any private
purpose and will not directly or indirectly use the
same for any of said purposes. I further state that
said Ernest C. Reed has been absent from the State
of Iowa since June 7, 1909. That I did not discover
the fact that Ernest C. Reed had committed a crime
in connection with the transaction that occurred on
said date until I had the title examined to the prop-
erty in question which was a long time after said
date and that since the discovery of said crime I
have been endeavoring to locate said Ernest C.
Reed and that on or about November 20, 1914, I
learned that he was in Los Angeles, California, and

that this is the cause for the delay in making the application for the requisition.

(Signed) ASAPH SERGEANT.

Signed and sworn to before me this 21st day of November, 1914.

WM. THEOPHILUS, (Signed)
Judge of the District Court of Iowa in and for the
Seventh Judicial District of said State. [52]

COPY.

JUDGE'S AND CLERK'S CERTIFICATE.

*In the District Court of Iowa, in and for Scott
County.*

State of Iowa,
Scott County.

I, WM. THEOPHILUS, one of the Judges of the Seventh Judicial District of Iowa, within which is included Scott County, do hereby certify that H. J. McFarland, whose genuine signature is attached to the foregoing and attached certificate, was at the date thereof, to wit:

November 21st, 1914, the clerk of the District Court in and for Scott County, duly elected, qualified and acting, and the person having by law the custody of the seal of said Court, and that said certificate is in due form.

Witness my hand hereto this 21st day of November, A. D. 1914.

(Signed) WM. THEOPHILUS,
Judge Seventh Judicial District.

State of Iowa,
Scott County,—ss.

I, H. J. McFarland, Clerk of the District Court with and for Scott County, do hereby certify that Hon. Wm. Theophilus, whose genuine signature is affixed to the foregoing certificate, was at the date thereof, to wit, November 21st, A. D. 1914, one of the Judges of the District Court of said Judicial District, duly elected, qualified and acting.

WITNESS my hand and the seal of the Court hereto affixed, at my office in Davenport, in said County this 21st day of November, 1914.

H. J. McFARLAND, (Signed)
Clerk of Said Court.

(With the seal of said Court impressed thereon.)

[53]

[Rules of Practice—Exhibit to Return.]

COPY.

RULES OF PRACTICE.

**ALL PAPERS MUST BE IN DUPLICATE, AND
APPLICATION MUST BE MADE BY
COUNTY ATTORNEY.**

When the application is based upon indictment the application must be accompanied by duly attested copy of the indictment.

When application is based upon information the application must be accompanied by certified copies of the information and warrant of arrest certified to by the magistrate and the genuineness of his signature and such information must be supported

and accompanied by affidavit or affidavits, sworn to before the Magistrate (a notary public is not a magistrate within the meaning of the statute) by some person or persons having knowledge, setting forth the details of the commission of the crime.

In all cases of fraud, false pretenses, embezzlement or forgery, the affidavit of the principal complaining witness or informant, that the application is made in good faith, for the sole purpose of punishing the accused, and that he does not desire or expect to use the prosecution for the purpose of collecting a debt, or for any private purpose, and will not directly or indirectly use the same for any of said purposes, should accompany the application, whether based on indictment or information.

An affidavit should also accompany the application even though based on indictment where requisition is made upon the State of Pennsylvania and the crime is that of seduction.

If there has been any former application for a requisition for the same person, growing out of the same transaction, it should be so stated, with an explanation of the reasons for a second request, together with the date of such application, as near as may be.

If the offense charged is not of recent occurrence a satisfactory reason should be given for the delay in making the application. [54]

[Endorsed]: No. 899—Crim. In the District Court of the United States in and for the Southern District of California, Southern Division. In the Matter of the Application of Ernest C. Reed for Writ of

Habeas Corpus. Writ of Habeas Corpus. Received Copy of the Within this —— day of ——, 191—. Attorney for ——, Collier, Shelton & Schlegel, 811 Herman W. Hellman Bldg., Sunset, Main 9480, Home A4201, Los Angeles, California, Attorneys for Petitioner. 3-6-14—500. Return of C. E. Sebastian, Chief of Police of the City of Los Angeles, and Patrick J. Phelan, Agent of the State of Iowa. Filed Dec. 18, 1914. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy. [55]

[Order on Hearing—December 18, 1914.]

At a stated term, to wit, the July Term, A. D. 1914, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the City of Los Angeles, on Friday, the eighteenth day of December, in the year of our Lord one thousand nine hundred and fourteen. Present, The Honorable BENJAMIN F. BLEDSOE, District Judge.

No. 899—CRIM. S. D.

In the Matter of the Application of ERNEST C. REED for a Writ of Habeas Corpus.

This cause coming on this day to be heard on a writ of habeas corpus; James E. Shelton, Esq., Frank C. Collier, Esq., and John Schlegel, Esq., appearing as counsel for petitioner; Percy V. Hammon, Esq., Deputy District Attorney of Los Angeles County, California, and C. A. Stutsman, Esq., appearing as counsel for respondents; and the return

of respondents to the writ of habeas corpus having been filed in open court; and said cause having been argued, on behalf of petitioner, by Frank C. Collier, Esq., of counsel for petitioner, and on behalf of respondents by C. A. Stutsman, Esq., and Percy V. Hammon, Esq., of counsel for respondents, and further on behalf of petitioner by Frank C. Collier, Esq., of counsel for petitioner, and further on behalf of respondents by C. A. Stutsman, Esq., of counsel for respondents, and further on behalf of petitioner by Frank C. Collier, Esq., of counsel for petitioner; it is ordered that this cause be, and the same hereby is continued for further hearing until Saturday, the 19th day of December, 1914, at 10:30 o'clock A. M.

[56]

[Order Denying Application for Leave to Introduce Evidence, Discharging Writ of Habeas Corpus, etc.]

At a stated term, to wit, the July Term, A. D. 1914, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the City of Los Angeles, on Saturday, the nineteenth day of December, in the year of our Lord one thousand nine hundred and fourteen. Present, The Honorable BENJAMIN F. BLEDSOE, District Judge.

No. 899—CRIM. S. D.

In the Matter of the Application of ERNEST C. REED for a Writ of Habeas Corpus.

This cause coming on this day to be further heard

on the writ of habeas corpus and respondents' return thereto; Frank C. Collier, Esq., John Schlegel, Esq., and James E. Shelton, Esq., appearing as counsel for petitioner; Percy V. Hammon, Esq., Deputy District Attorney of Los Angeles, California, and C. A. Stutsman, Esq., appearing as counsel for respondents; it is now by the Court ordered, that the application for leave to introduce evidence herein be, and the same hereby is denied, and it is further ordered that the writ of habeas corpus herein be, and the same hereby is discharged, the petitioner to be remanded to the custody of respondents; whereupon, a Petition for Order Allowing Appeal and Assignments of Errors, having been presented on behalf of petitioner by his said counsel, and filed herein, an order allowing an appeal herein to the United States Circuit Court of Appeals for the Ninth Circuit, and fixing the bail of petitioner on said appeal at \$7,500.00 is presented, signed and filed in open court, and it is further ordered that petitioner be, and he hereby is remanded to the custody of the U. S. Marshal for this district until said bail is given.

[57]

*In the District Court of the United States, Southern
District of California, Southern Division.*

In the Matter of the Application of ERNEST C.
REED for Writ of Habeas Corpus.

**Petition for Appeal to the Circuit Court of Appeals
in Habeas Corpus.**

The said Ernest C. Reed by his attorneys, Messrs.
Collier, Shelton & Schlegel, feeling himself aggrieved

by the order and judgment entered on December 19, 1914, in the above-entitled proceeding does hereby appeal from the said order to the Circuit Court of Appeals for the Ninth Circuit and prays that his appeal may be allowed and that a transcript of the record of proceedings and papers upon which said order is made, duly authenticated, may be sent to the Circuit Court of Appeals of the Ninth Circuit of the United States.

COLLIER, SHELTON & SCHLEGEL.

By COLLIER,

Attorneys for Petitioner.

FCC: MGC.

[Endorsed]: No. 899—Crim. In the District Court of the United States in and for the Southern District of California, Southern Division. In the Matter of the Application of Ernest C. Reed for Writ of Habeas Corpus. Petition for Appeal to the Circuit Court of Appeals in Habeas Corpus. Filed Dec. 19, 1914. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy. Collier, Shelton & Schlegel, 811 Herman W. Hellman Building, Sunset, Main 9480, Home A4569, Los Angeles, California, Attorneys for Petitioner. [58]

*The United States Circuit Court of Appeals for the
——— Circuit, Term of ———, in the Year of
our Lord, One Thousand Nine Hundred and
Fourteen.*

In the Matter of the Application of ERNEST C.
REED for Writ of Habeas Corpus.

Assignment of Error.

Afterward, to wit, on the —— day of December, 1914, in this same term, before the honorable judges of the Circuit Court of Appeals for the Ninth Circuit, in the City of San Francisco, State of California, comes Ernest C. Reed by his attorneys Messrs. Collier, Shelton & Schlegel and says that in the records and proceedings aforesaid there is manifest error in this, to wit: That the District Court of the United States, in and for the Southern District of California, Southern Division, erred in discharging the Writ of Habeas Corpus, and refusing the application of the said Ernest C. Reed therefor.

Again, in that said District Court did not hold that the indictment presented to the Governor of the State of California, did not properly and legally charge the petitioner with a crime against the laws of the State of Iowa.

Again, that said District Court erred in excluding the testimony offered by the petitioner for the purpose of showing that petitioner was publicly a resident within the State of Iowa for more than three years after the alleged commission of the alleged crime set forth in said indictment, and was for more

than three years after the alleged commission of said offense not without the reach of criminal process in said State of Iowa, and is therefore not a fugitive from justice.

For further errors appearing upon the record.

WHEREAS, by the law of the land the said Writ of Habeas Corpus should have been granted and the prisoner discharged. [59]

And the said Ernest C. Reed prays that the order and judgment aforesaid may be reversed, annulled and held for naught and for such other relief as may be proper in the premises.

COLLIER, SHELTON & SCHLEGEL.

By COLLIER,

Attorneys for Petitioner.

FCC: MGC.

[Endorsed]: No. 899—Crim. The United States District Court for the Southern Dist. of California. In the Matter of the Application of Ernest C. Reed for Writ of Habeas Corpus. Assignment of Error. Filed Dec. 19, 1914. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy. Collier, Shelton & Schlegel, Attorneys for Ernest C. Reed. Attorneys at Law, 811 H. W. Hellman Building, Los Angeles, California. Notaries Public. [60]

*In the District Court of the United States, Southern
District of California, Southern Division.*

In the Matter of the Application of ERNEST C.
REED for Writ of Habeas Corpus.

Order Allowing Appeal.

And now, to wit, on December 19, 1914, it is ordered that the appeal of the said petitioner Ernest C. Reed be allowed upon the following terms and under the following regulations: That the said Ernest C. Reed be taken into the custody of the United States Marshal for the Southern District of California to be by him safely kept, and that the said Ernest C. Reed do execute and deliver a good and sufficient bond in the sum of \$7,500.00 with security to be approved by Charles N. Williams a Commissioner of said United States District Court, which said bond when approved shall be filed with the clerk of said Circuit Court of Appeals of the United States in and for the Ninth Circuit and shall be conditioned as follows: That the said Ernest C. Reed do deliver himself up to the Marshal of said Southern District and to appear before the Circuit Court of Appeals whenever and wherever ordered by this court or by the said Circuit Court of Appeals and do then and there abide by and perform the judgment of the Circuit Court in the premises.

And that the said Ernest C. Reed do cause to be sent to said appellate tribunal a transcript of the petition, writ of habeas corpus and return thereto and other proceedings and documents and affidavits

of said cause immediately upon the execution of said bond. And that upon the execution and approval of said bond as aforesaid and tender of the same, the said Ernest C. Reed be discharged from the custody of said Marshal and allowed to go free, subject to the terms of this order or [61] the final disposition of said Appellate Court.

Done in open Court December 19, 1914.

BENJAMIN F. BLEDSOE,
United States District Judge.

FCC: MGC.

[Endorsed]: No. 899—Crim. In the District Court of the United States, in and for the Southern District of California, Southern Division. In the Matter of the Application of Ernest C. Reed for Writ of Habeas Corpus. Order Allowing Appeal. Filed Dec. 19, 1914. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy. Collier, Shelton & Schlegel, 811 Herman W. Hellman Building, Sunset, Main 9480, Home A4569. Los Angeles, California, Attorneys for Petitioner. [62]

In the United States Circuit Court of Appeals for the Ninth Circuit, Term of ———, in the Year of Our Lord One Thousand Nine Hundred and Fourteen.

Bail Bond Pending Appeal on Writ of Habeas Corpus.

In the Matter of the Application of ERNEST C. REED for Writ of Habeas Corpus.

United States of America,
Southern District of California,—ss.

We, George T. Parr and J. H. Reid, jointly and severally acknowledge ourselves in debt to the United States of America in the sum of \$7,500.00 lawful money of the United States of America to be levied on our and each of our goods, chattels, lands and tenements upon this condition.

WHEREAS, the said Ernest C. Reed has sued out an appeal from the District Court of the United States for the Southern District of California in the matter of the application of the said Ernest C. Reed for Writ of Habeas Corpus for a review of said judgment in the United States Circuit Court of Appeals for the Ninth Circuit.

Now, if the said Ernest C. Reed shall appear and surrender himself in the District Court of the United States for the Southern District of California, or in the Circuit Court of Appeals of the United States in and for Ninth Circuit upon the final determination of said appeal or upon any other or further orders of said courts, or either of them, and from time to

time thereafter as he may be required to answer any further proceedings and abide by and perform any judgment or order which may be had or rendered therein in this matter and shall abide and perform any judgment or order which may be rendered in said United States Circuit Court of Appeals in and for the Ninth Circuit, and not depart from said District Court [63] without leave thereof, then this application shall be void, otherwise to remain in full force and virtue.

WITNESS our hands and seals this 19th day of December, A. D. 1914.

GEORGE T. PARR.

J. H. REID.

United States of America,
Southern District of California,—ss.

George T. Parr and J. H. Reid, the sureties whose names are subscribed to the above undertaking, being severally duly sworn, each for himself, says:

That he is a resident and freeholder in the County of Los Angeles, State of California, and is worth the sum in said undertaking specified, as the penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt from execution.

GEORGE T. PARR.

J. H. REID.

Subscribed and sworn to before me this 19th day of December, 1914.

[Seal]

CHAS. N. WILLIAMS,

U. S. Commissioner.

Taken and approved this 19th day of December, 1914, before me Chas. N. Williams, United States

Commissioner in and for the Southern District of California, Southern Division.

CHAS. N. WILLIAMS,
United States Commissioner.

FCC: MGC.

The foregoing bond is approved this 19th day of December, 1914.

BENJAMIN F. BLEDSOE,
U. S. District Judge.

[Endorsed]: No. 899—Crim. The United States Circuit Court of [64] Appeals for the ——— Circuit: Term of ———, in the Year of Our Lord One Thousand Nine Hundred and Fourteen. In the Matter of the Application of Ernest C. Reed for Writ of Habeas Corpus. Bail Bond Pending Appeal on Writ of Habeas Corpus. Filed Dec. 19, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Collier, Shelton & Schlegel, Attorneys for Ernest C. Reed, Attorneys at Law, 811 H. W. Hellman Building, Los Angeles, California, Notaries Public. [65]

UNITED STATES OF AMERICA.

District Court of the United States, Southern District of California, Southern Division.

Clerk's Office.

No. 899—CRIM.

In the Matter of the Application of ERNEST C. REED for a Writ of Habeas Corpus.

Praeipice [for Transcript of Record].

To the Clerk of Said Court:

Sir: Please issue a certified transcript of the record in the above-entitled matter to constitute the record on appeal to the U. S Circuit Court of Appeals, and to consist of the following:

Minutes of the court.

Assignment of Error.

Order allowing appeal.

Petition for appeal to the U. S C. C. A.

Order for issuance of Writ of Habeas Corpus.

Petition for Writ of Habeas Corpus.

Return of C. E. Sebastian, Chief of Police and P. J.

Phelan, as agent, etc., to Writ of Habeas Corpus.

Order fixing Bail.

Writ of Habeas Corpus.

Bail Bond on Appeal.

12/19/14.

COLLIER SHELTON & SCHLEGEL.

By COLLIER.

[Endorsed]: No 899—Crim. U. S. District Court, Southern District of California, Southern Division. In Re Application of Ernest C. Reed for Writ of Habeas Corpus. Praeipice for Transcript. Filed Dec. 19, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [66]

**[Certificate of Clerk U. S. District Court to
Transcript of Record, etc.]**

*In the District Court of the United States, in and
for the Southern District of California, South-
ern Division.*

No. 899—CRIM.

In the Matter of the Application of ERNEST C.
REED for a Writ of Habeas Corpus.

I, Wm. M. Van Dyke, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing sixty-six (66) typewritten pages, numbered from 1 to 66, inclusive, and comprised in one (1) volume, to be a full, true and correct copy of the Petition for Writ of Habeas Corpus, Order for Issuance of Writ of Habeas Corpus, Writ of Habeas Corpus, Order Fixing Bail Return of C. E. Sebastian, Chief of Police, and P. J. Phelan as Agent of the State of Iowa, to Writ of Habeas Corpus, Minute Order of December 18, 1914, Minute Order of December 19, 1914, Petition for Appeal, Assignment of Error, Order Allowing Appeal, Bond on Appeal, and Praecipe for Transcript on Appeal, in the above and therein entitled matter, and that the same together constitute the record in said cause as specified in the said Praecipe for Transcript on Appeal filed in my office on behalf of the petitioner and appellant herein by his attorneys of record.

I do further certify that the cost of the foregoing

record is \$31.50/100, the amount whereof has been paid me by Ernest C. Reed, the petitioner and appellant in said [67] matter.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this 23d day of January, in the year of our Lord one thousand nine hundred and fifteen, and of our Independence the one hundred and thirty-ninth.

[Seal]

WM. M. VAN DYKE,

Clerk of the District Court of the United States of America, in and for the Southern District of California.

[Ten Cent Internal Revenue Stamp. Canceled Jan. 23, 1915. W. M. V. D.] [68]

[Endorsed]: No. 2565. United States Circuit Court of Appeals for the Ninth Circuit. Ernest C. Reed, Appellant, vs. The United States of America, Charles E. Sebastian, Chief of Police of the City of Los Angeles, and Patrick J. Phelan, Agent of the State of Iowa, Appellees. In the Matter of the Application of Ernest C. Reed for a Writ of Habeas Corpus. Transcript of Record. Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

Filed January 27, 1915.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Ernest C. Reed,

Appellant,

vs.

United States of America, Charles
E. Sebastian, Chief of Police of
the City of Los Angeles, and
Patrick J. Phelan Agent of the
State of Iowa,

Appellees.

APPELLANT'S OPENING BRIEF.

Filed

APR 23 1915

D. Monckton,
Clerk

COLLIER, SHELTON & SCHLEGEL,
By FRANK C. COLLIER,

Attorneys for Appellant.

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United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Ernest C. Reed,

Appellant,

vs.

United States of America, Charles
E. Sebastian, Chief of Police of
the City of Los Angeles, and
Patrick J. Phelan Agent of the
State of Iowa,

Appellees.

IN THE MATTER OF THE APPLICATION OF ERNEST C.
REED FOR WRIT OF HABEAS CORPUS.

APPELLANT'S OPENING BRIEF.

STATEMENT OF THE CASE.

Ernest C. Reed, appellant herein, applied for a writ of habeas corpus directed to Charles E. Sebastian, as Chief of Police of the City of Los Angeles, State of California, and Patrick J. Phelan, as Agent of the State of Iowa, requiring them to bring the body of the said Ernest C. Reed before the Honorable Benjamin F. Bledsoe, judge of the District Court of the United

States in and for the Southern District of California, Southern Division, at Los Angeles.

The petition for the writ was filed December 17, 1914, and thereupon and on the same date an order was signed by said district judge directing the writ of habeas corpus to issue, and thereafter and on said December 17, 1914, a writ of habeas corpus was issued directed to said Sebastian and said Phelan in their respective official capacities, and was on December 17, 1914, served on said officers by the United States marshal at Los Angeles, and on said day the said Ernest C. Reed was admitted to bail in the sum of five thousand dollars.

Thereafter and on December 18, 1914, the return of said officers to said writ was duly filed with the clerk of said United States District Court.

On December 18, 1914, said Ernest C. Reed appeared, represented by his counsel, Collier, Shelton & Schlegel; the state of Iowa being represented by Percy V. Hammon, deputy district attorney in and for Los Angeles county, California, and C. A. Stutsman, Esq., of counsel.

The said Ernest C. Reed through his counsel then presented the points raised on behalf of said petitioner in paragraph I of said petition, subdivision (a), but was informed by said court that he did not care to hear from counsel thereon but to proceed with the argument on the question of admissibility of evidence to show the bar of the statute of limitations.

Under such admonition counsel then passed to the question of the right and duty of said District Court

to admit evidence for the purpose of showing that the alleged criminal offense, if any there was, was barred by section 5165 of the Annotated Codes of 1897 of the state of Iowa. Counsel stated to the court that he was prepared to show, by witnesses then present in the court room, and by depositions to be taken in Iowa, in the event that the court should rule that testimony was admissible, that the said Ernest C. Reed was for more than three years after the alleged offense was committed, publicly a resident of the state of Iowa; that for more than three years after said alleged offense was committed the said Ernest C. Reed was constantly within the reach of the process of the state of Iowa, both civil and criminal, and for that reason said alleged offense was barred by the statute of limitations. That said evidence did not go to the defense of the matters charged in the indictment set out in said petition, but went entirely to the question of fact, always open to proof—to-wit: was petitioner a fugitive from justice; that if it could be shown that the prosecution was barred by the statute the petitioner was not a fugitive from justice, and the writ of habeas corpus should be granted and the prisoner discharged from custody and his bail exonerated.

After argument by counsel for both petitioner and respondents, the case was submitted to the court for decision, and thereafter and on December 19, 1914, the said Honorable Benjamin F. Bledsoe, as such district judge, denied the application of petitioner to introduce the evidence hereinabove referred to, declined to hear further arguments, discharged the writ of

habeas corpus theretofore issued, and remanded the petitioner to custody.

That thereafter and on said December 19, 1914, leave was duly and regularly granted to petitioner to appeal to the Circuit Court of Appeals of the United States and petitioner was admitted to bail in the sum of seventy-five hundred dollars, which was duly and regularly furnished, and the petitioner is now out on bail.

That thereafter and on said 19th day of December, 1914, the petitioner and appellant duly filed his assignments of error and thereafter duly perfected his appeal.

SPECIFICATIONS OF ERROR.

I.

APPELLANT RESPECTFULLY REPRESENTS TO THE COURT THAT THE SAID DISTRICT COURT ERRED IN THAT IT DID NOT HOLD THAT THE INDICTMENT PRESENTED TO THE GOVERNOR OF THE STATE OF CALIFORNIA DID NOT PROPERLY AND LEGALLY CHARGE THE PRISONER WITH A CRIME AGAINST THE LAWS OF THE STATE OF IOWA.

In this connection the appellant begs leave to submit the following sub-specifications as to the insufficiency of said indictment:

(a) That said indictment upon which the writ of rendition is based, and a true copy whereof is set forth on pages 15 *et seq.* of the Transcript of Record, purporting to have been filed in the District Court of the county of Scott, state of Iowa, on September 25, 1914,

is wholly insufficient as an indictment in the following particulars, to-wit:

(1) That it does not state facts sufficient to constitute a public offense or a crime or to charge the said Ernest C. Reed with any crime or public offense.

Section 2, clause 2, Article IV of the Constitution of the United States declares: "That a person *charged* in any state with treason, felony or *any other crime*
* * *"

Obviously, then, the prisoner must be charged with some crime, and therefore it is necessary that all of the elements of any one crime sought to be charged must be present.

Justice Moody, in the case of *Pierce v. Creecy*, 210 U. S. 387, says:

"The Constitution provides that: 'A person charged in any state with treason, felony or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime' (Art. 4, Section 2, Clause 2). No person may be lawfully removed from one state to another by virtue of this provision unless: 1, he is charged in one state with treason, felony or other crime; 2, he has fled from justice; 3, a demand is made for his delivery to the state wherein he is charged with crime. If either of these conditions is absent the Constitution affords no warrant for a restraint of the liberty of any person. Here the only condition which it is insisted is absent is the charge of a crime. THE

ONLY EVIDENCE OF A CHARGE OF CRIME IS THE INDICTMENT, AND THE CONTENTION TO BE EXAMINED IS THAT THE INDICTMENT IS INSUFFICIENT PROOF THAT A CHARGE HAS BEEN MADE.”

“The only safe rule is to abandon entirely the standard to which the indictment must conform judged as a criminal pleading, and consider only whether it shows satisfactorily that the fugitive has been in fact, however inartificially, CHARGED WITH CRIME IN THE STATE FROM WHICH HE HAS FLED.”

And in commenting on the indictment before him in that case, says:

“The indictment, whether good or bad, as a pleading, UNMISTAKABLY DESCRIBES EVERY ELEMENT OF THE CRIME OF FALSE SWEARING AS IT IS DEFINED IN THE TEXAS PENAL CODE, ETC.”

which is but another way of stating that *every element* of a crime must in some manner, though inartificially, be stated or charged in the indictment or affidavit.

And the court in the case of *United States v. Reddin*, 193 Fed. 798, 802, says:

“In these proceedings (removal for trial, which to all intents and purposes is the same as extradition) all technical considerations are to be avoided as far as possible. *McNichols v. Pease*, 207 U. S. 100. One highly technical and narrow rule is found necessary which is that the *indictment cannot be attacked as a pleading* BUT MAY BE AS A PIECE OF EVIDENCE; that is, abandon entirely the standard fixed by courts as a test of criminal proceedings AND INQUIRE ONLY WHETHER

IT SHOWS SATISFACTORILY IF THE ACCUSED HAS BEEN IN FACT, HOWEVER INARTIFICIALLY, CHARGED WITH A CRIME.”

Treated, then, in the language of the last case above cited, as evidence of the charge of the crime, can it be said that there was sufficient evidence before either governor for any court to charge the defendant with a crime. Attention in this matter is particularly called to *State v. Loser*, 132 Iowa 419, *infra*.

The indictment in the instant case evidently attempts to charge the crime of cheating by false pretenses [see Transcript, page 15]. If not that, then with what crime is it attempting to charge petitioner? Unless *all the elements* of cheating by false pretenses or any other crime are present, then no crime whatever has been sufficiently charged in the indictment, and therefore it is barred even within the view of *Pierce v. Creecy*, *supra*.

In *State v. Loser*, 132 Iowa 419, 104 N. W. 337, 339, the court says:

“But in view of the allegations of the indictment and the charges given by the court, it was important that the crime of larceny and of cheating by false pretenses be clearly distinguished. That there is a distinction between the two is apparent, although they are in some respects similar in character. The distinction is this: If the false pretenses induce the owner to part with his property INTENDING TO TRANSFER BOTH TITLE AND POSSESSION, the crime is *cheating by false pretenses*. If, on the other hand, one by fraud, trick

or false pretenses, INDUCES THE OWNER TO PART MERELY WITH THE POSSESSION OF HIS PROPERTY, THERE BEING NO INTENT TO PASS THE TITLE, and the party who receives it took it with intent fraudulently to convert it to his own use, *the crime is larceny*. * * * Having charged as already indicated the trial court undertook to define the crime of cheating by false pretenses, and, among other things, said that to make out the conspiracy it should be shown that the means to be used were such as had they been successful the defendants would have been guilty of cheating by false pretenses. It further charged that, if the false pretenses were such as to induce the prosecutors to endorse and turn over to the defendants the absolute possession and apparent ownership of certain drafts in order to settle an assumed controversy, this would make out the crime of cheating by false pretenses, and it would make no difference in this respect even should it appear from the evidence that when the prosecutors parted with their drafts they did not intend to part with the title to their property. In other instructions the court defined larceny and said that if the defendant conspired to obtain the property through larceny, the defendant would not be guilty. Larceny was properly defined in these instructions, but in the one to which we have referred, the crime of cheating by false pretenses was not described. IT IS NOT THE OBTAINING OF THE APPARENT TITLE WHICH CONSTITUTES THE CRIME, FOR POSSESSION OF AN ENDORSED DRAFT ALONE GIVES AN APPARENT TITLE, NO MATTER HOW THAT POSSESSION BE OBTAINED. IF THE PROSECUTORS DID NOT INTEND TO PART WITH THE TITLE, BUT DELIVERED THE POSSESSION

FOR TEMPORARY PURPOSE, AND DEFENDANTS TOOK AND FRAUDULENTLY CONVERTED IT, THEY WERE GUILTY OF LARCENY AND NOT OF THE CRIME OF CHEATING BY FALSE PRETENSES. * * * The fifth instruction asked by the defendant, which read in this wise, should have been given, 'If these defendants conspired to induce Gregory and Barker to part with the *possession* of the things described in the indictment, or some or all of them, *without purpose* on the part of Gregory and Barker *to part with the property in said things*, and expecting their return, and the conspiracy includes a felonious intent to deprive the owners of the goods; or if it wa s the purpose of the conspiracy *to obtain the possession only by a trick*, artifice or false pretense, with felonious intent to convert what was obtained to their own use, that would be a conspiracy to commit larceny, and if you find that such was the conspiracy, *you must acquit the defendant*,' and we think that the seventh, reading as follows, should also have been given, 'should you find that the defendant conspired to induce Gregory and Barker to bet on a foot race, and to that end to place the things described in the indictment, or some of them, in the hands of the stakeholder, you are instructed that this *would not be a conspiracy to obtain title to the property*, and if you find that such was the conspiracy, *you must acquit the defendant*.'

"Sixth: We hardly deem it necessary to say that one indicted for conspiracy to cheat by false pretenses may not on that charge be convicted of a conspiracy to commit larceny."

In view of the foregoing, which is a recent decision, to-wit: 1905, of the Supreme Court of the *state of Iowa*, the state from which it is alleged petitioner fled, and *according to whose laws the crime must be charged*, one of the essential elements of false pretenses is that there must have been an intent on the part of the party defrauded to part with the title to his property, or else there is no crime of cheating by false pretenses charged.

On the other hand, unless the charge of crime includes the element of intent to deprive the party defrauded of possession merely, with no intent on his part to deprive himself of the title, then the crime of larceny has not been charged.

If neither cheating by false pretenses or larceny has been charged, *then what crime has been charged?* Certainly the indictment in question intended to charge either the crime of larceny or the crime of cheating by false pretenses. Manifestly from the face of the indictment itself it is intended to charge the crime of cheating by false pretenses [see Transcript, page 15]. The indictment will be searched in vain for any statement that Asaph Sargent intended to part with the title to his said property. It is impossible to tell from the indictment whether it is intended to charge that Sargent deposited with Reed a draft and stock mentioned in the indictment for a temporary purpose, or whether he intended to part with the title thereto. As said in *State v. Loser, supra*:

“It is not the obtaining of the *apparent title* which constitutes the crime, for possession of an

endorsed draft alone gives an apparent title, no matter how that possession be obtained. If the prosecutors did not intend to part with the title, but delivered the possession for temporary purposes, and the defendants took and fraudulently diverted it, they were guilty of larceny and not of the crime of cheating by false pretenses.”

Therefore, the recital of the delivery by Sargent of a draft endorsed by him and of stock endorsed by him without any further statement that it was his intention then and there to part with the title thereto, or a statement that he merely delivered them for a temporary purpose, is entirely insufficient and fails to state an important element of either crime, therefore neither the crime of larceny, cheating by false pretenses or any other crime has been CHARGED, and the indictment on which the writ of rendition is based is absolutely void.

FURTHER, THE INDICTMENT DOES NOT CHARGE A PUBLIC OFFENSE, FOR THE REASON THAT IT DOES NOT SHOW THAT ANY PERSON HAS BEEN DEFRAUDED.

In *State v. Clark*, 26 Pac. 481, the court says:

“To constitute the offense charged in the information (obtaining money under false pretenses) * * * four elements must concur, which should be averred and proved: (1) There must be an intent to defraud; (2) there must be an actual fraud committed; (3) false pretenses must have been used for the purpose of perpetrating the fraud; and (4) the fraud must be accomplished by means of the false pretenses made use of for the purpose, viz., they must be the

cause, in whole or in part, which induced the owner to part with his property. * * * The language of the court in the case of *People v. Wakely*, 62 Mich. 297, is: 'But it does not amount in law to a false pretense unless made with a fraudulent intent, *and the person parting with the property is actually defrauded.*' Was the Stock Yards Bank actually defrauded? What right was it deprived of in the business transaction? * * * If it was not defrauded, *this essential ingredient of the crime charged is lacking*, AND UNLESS EVIDENCE CAN BE PRODUCED TO SHOW THAT THE bank was actually defrauded, the defendant should be discharged."

Applying the above statement of the law to a case similar to the one at bar, we find in *Graves v. State*, 19 S. W. 895 (which, by the way, is a Texas case, and therefore is competent authority on the question whether Sargent in the instant case was defrauded), the following language:

"Appellant was indicted for the offense of swindling, was convicted, and his punishment assessed at two years' confinement in the penitentiary, on which judgment sentence was rendered and he appeals. The indictment charges the defendant with having obtained from W. C. Reeves money, mules, a wagon and other personal property aggregating \$295.00 in *exchange for a tract of land which he then and there represented to said Reeves to be free from encumbrance, but in truth and in fact there was an encumbrance on said land, which had been given by defendant to one G. S. Dickerson*, defendant's vendor; that the

said incumbrance was a written instrument in words and figures as follows (here follows a copy of the instrument) * * *. The only question is, is the indictment sufficient? Whether the note set out in the indictment is a lien on the land in the hands of the purchaser Reeves necessarily depends upon the recitals in the deed from Dickerson to defendant. Of itself, though retaining a vendor's lien, the note cannot constitute a lien UNLESS THE PROSECUTOR HAD NOTICE OF THE NOTE AND ITS RECITALS BEFORE HE PURCHASED, BUT THIS CANNOT BE, BECAUSE THE INDICTMENT ALLEGES THAT THE PROSECUTOR PURCHASED THE LAND WITHOUT NOTICE, AND WITHOUT NOTICE OF THE EXISTENCE OF THE VENDOR'S LIEN NOTE, AND PAID DEFENDANT FOR THE LAND. Unless the deed of defendant from his vendor Dickerson retains a lien or recites the fact that the land is still unpaid for, the purchaser occupies the Gibraltar of defenses, 'an innocent purchaser without notice.' If, however, the lien is reserved in the deed, and the purchaser is bound by the recitals in his chain of title, or if he is bound by the record of the deed, from which the law will presume notice, THESE FACTS SHOULD HAVE BEEN ALLEGED IN THE INDICTMENT. MERELY TO STATE THAT A NOTE WHICH IS SET OUT IN THE INDICTMENT IS A LIEN ON THE LAND IS BUT AN INFERENCE OF THE PLEADER NOT SUSTAINED BUT REBUTTED BY THE FACTS PLEADED BY HIM. IT IS NOT A MERE QUESTION OF EVIDENCE. THE DEED AND THE NOTE ARE PARTS OF THE SAME TRANSACTION, CONSTITUTING A LIEN ON THE LAND IN THE HANDS OF THE PROSECUTING WITNESS W. C. REEVES WE THEREFORE

HOLD THAT THE INDICTMENT IS INSUFFICIENT TO SUSTAIN THE CONVICTION, AND THE JUDGMENT IS REVERSED.”

The indictment in the instant case nowhere makes a statement of any kind that Sargent was defrauded in any manner. It does not state anywhere that he ever received the property in question or that there was any other consideration moving from Reed to him, and so far as the indictment is concerned there is nothing to show that the alleged statements claimed to have been made by Reed were anything more than mere idle statements. It is not shown that Sargent gave any of the property mentioned to Reed for any purpose whatsoever, nor how or in what manner the alleged representations of Reed were the basis upon which he parted with his property. And in this connection the language used by the court in *State v. Barbee*, 37 S. W. 1119, 1120, is in point, to-wit:

“Furthermore, it is well settled law, both in this state and elsewhere, that it is not every false pretense which can be made a basis of a criminal prosecution. It must be such a one as is calculated to deceive. Now, in this case we know (because the indictment does not charge it) that defendant did not represent to Kern that Watson was solvent. TAKING THIS AS TRUE, IT IS UTTERLY INCONCEIVABLE THAT KERN COULD HAVE BEEN INDUCED AND DECEIVED IN PARTING WITH THE MONEY OF THE BANK ON THE MERE NAKED AND UNSUPPORTED ASSERTION OF DEFENDANT THAT HE WAS THE OWNER OF A NOTE ON WATSON FOR AN UNCERTAIN AMOUNT AND DUE AND PAYABLE AT

A DAY UNCERTAIN. SUCH REPRESENTATIONS MADE UNDER SUCH CIRCUMSTANCES ARE CALCULATED TO DECEIVE NO ONE, AND THEREFORE, IF MADE, CONSTITUTE NO CRIME. * * * Moreover, it must be clear that even if defendant had represented to Kern that Watson was solvent, etc., and such representations were false and made with intent to defraud, STILL NO CRIME WAS COMMITTED UNLESS THE INDICTMENT SHOWS, AND SPECIFICALLY SETS FORTH, THAT SOMETHING ELSE WAS DONE BY THE DEFENDANT IN ADDITION TO AND AFTER MAKING THE FALSE PRETENSES. This the indictment does not do, because it does not appear therefrom that the overdrafts were drawn by the defendant after the false pretense was made. * * * But if the overdrafts were made prior to making the false pretenses, and the payments made after that,—if this is the correct view of the matter,—THEN ON THE FACE OF THE INDICTMENT NO CRIME IS CHARGED, BECAUSE FROM THE INDICTMENT IT DOES NOT APPEAR HOW THIS WAS, AND IT IS THE DUTY OF THE PLEADER IN DRAFTING AN INDICTMENT TO DISTINCTLY CHARGE THE FACTS WHICH CONSTITUTE THE CRIME.”

The intention of the court is called to the fact that it nowhere appears that the premises were deeded to Asaph Sargent, and if they were not deeded to Asaph Sargent, then, even granting, for the sake of the argument only, that the representations were made as alleged in the indictment that the land was clear, and that Reed was the owner of it, and granting, likewise for the sake of the argument only, that those representations were false, that Reed was not the owner of

the land, and furthermore that it was encumbered by a vendor's lien in the sum of two thousand five hundred dollars, how, under those circumstances, could Sargent be in any manner defrauded? What was it to him whether Reed owned the land or he didn't own the land, and what was it to him whether the land was encumbered by \$2500.00 vendor's lien or by a \$10,000.00 vendor's lien? Or, as the court quotes approvingly in the case of *State v. Barbee, supra*:

“It has been ruled that ‘a sale of goods induced by the buyer's false representations that he had in his office a certain quantity of property liable to his debts as a means of obtaining credit, will not warrant an indictment. Common prudence would require the prosecutor to resort to other information.’ ”

If, therefore, the alleged representations of Reed were made for the purpose of inducing Sargent to buy the land, then the indictment does not charge a crime within the meaning of the federal statutes, because that fact is not stated. If the alleged representations were made for the purpose of obtaining credit, then, in the language of *State v. Barbee*, just quoted, such statements “will not warrant an indictment. Common prudence would require the prosecutor to resort to other information.” And how can this, or any other court, state that a crime was charged, unless it can be shown from the only evidence before the court, to-wit, the indictment, or any of the papers or documents used in the extradition proceedings, before the governor of Iowa or of California, that such a false representation

was made as is in law sufficient to warrant an indictment?

Therefore, again we say that no crime has been charged against the appellant herein either as required by the laws of the state of Iowa or elsewhere.

II.

THAT THE SAID DISTRICT COURT ERRED IN EXCLUDING THE TESTIMONY OFFERED BY PETITIONER FOR THE PURPOSE OF SHOWING THAT PETITIONER WAS PUBLICLY A RESIDENT WITHIN THE STATE OF IOWA FOR MORE THAN THREE YEARS AFTER THE ALLEGED COMMISSION OF THE ALLEGED CRIME SET FORTH IN THE INDICTMENT, AND WAS FOR MORE THAN THREE YEARS AFTER THE ALLEGED COMMISSION OF SAID OFFENSE NOT WITHOUT THE REACH OF CRIMINAL PROCESS OF THE STATE OF IOWA, AND IS THEREFORE NOT A FUGITIVE FROM JUSTICE.

The indictment in question is set forth on pages 15, 16 and 17 of the Transcript of Record.

It will be noticed therefrom that the alleged offense was committed June 7, 1909, whereas the indictment was not filed until September 25, 1914, or five years, three months and eighteen days after the alleged commission of the offense.

The following are the sections of the Annotated Codes of 1897 of the state of Iowa upon the question of the statute of limitations:

Section 5163:

“A prosecution for murder may be commenced at any time after the death of the person killed.”

Section 5164:

“An indictment for a public offense may be found within eighteen months after its commission in the following cases, and not after: 1. Taking or enticing away an unmarried female under the age of consent, for the purpose of marriage or prostitution. 2. Seducing or debauching an unmarried female of previously chaste character. 3. For rape or adultery. 4. For an assault with intent to commit a rape.”

Section 5165:

“In all other cases an indictment for a public offense must be found within three years after the commission thereof, and not afterwards.”

Section 5167:

“If, when the offense is committed, the defendant is out of the state, the indictment or prosecution may be found or commenced within the time herein limited after his coming into the state, and no period during which the party charged was not publicly a resident within the state is a part of the limitation.”

That the petitioner had the undoubted right to introduce evidence in this matter showing that the alleged crime was barred by the statute of limitations of the state of Iowa for the purpose thereby of showing that he was not a fugitive from justice, is, we believe, clearly set forth and decided in the case of Bruce

v. Rayner, 124 Fed. 481, and as this case is nearly on all fours with the case at bar we shall take the liberty of making an extended quotation therefrom:

“This case comes up on appeal from the Circuit Court of the United States for the District of Maryland. Thomas Bruce, the appellant, being in the custody of an agent of the state of New Jersey under the warrant of the governor of Maryland, applied on January 2, 1903, to the Circuit Court of the United States for a writ of habeas corpus. His petition set forth his arrest and alleged unlawful detention under a warrant issued by the governor of Maryland in response to a requisition of the governor of New Jersey, and proceeds as follows: ‘Third: Your petitioner is advised and believes and charges that the said requisition is based upon an indictment alleged to have been found by the grand jury in and for the county of Essex, in the state of New Jersey, which indictment your petitioner charges as defective, illegal, null and void, and without reasonable or adequate foundation in law or in fact, and without probable cause; and your petitioner charges that said indictment does not show that any crime has been committed by him under the laws of the state of New Jersey, although professing so to charge him with the crime of bigamy.’

“The writ of habeas corpus having been issued, the body of the prisoner was produced and a return made to the writ. This return avers that the prisoner, Thomas Bruce, is lawfully in custody by virtue of a warrant issued to the agent of the state of New Jersey by the governor of the state of Maryland upon the request of the governor of New Jersey, on the ground that said Thomas

Bruce is within the state of Maryland as a fugitive from justice of the state of New Jersey under an indictment charging him with bigamy, a crime committed by him within the state of New Jersey against the laws of New Jersey; the papers accompanying the demand by the said governor of New Jersey being certified as authentic by him. To his return the petitioner, Thomas Bruce, replied that he was not lawfully in custody, has not been properly indicted for any offense against the laws of New Jersey, and especially and particularly of the crime of bigamy, and also denying that he is a fugitive from justice in the said state. Hearing the return the court discharged the writ and remanded the prisoner into custody. Leave to appeal was granted and the cause is here on eight assignments of error. The first six of these allege for error that the court did not hold the indictment presented by the governor of Maryland did not properly and legally charge the petitioner with a crime against the laws of New Jersey. The seventh and eighth assignments of error charge errors in the court in excluding testimony offered by the petitioner for the purpose of showing that within the two years succeeding March 11, 1897, the date charged in the indictment as the date of the alleged offense, the petitioner was a resident of the state of New Jersey, and, except at intervals when absent on business, was not without the reach of criminal process in said state, and, further, that the petitioner was a resident of the state of New Jersey, living there except at intervals when absent on account of business, prior to said alleged offense until about December 1, 1890. The warrant of the governor of Maryland does

not show whether he considered any evidence bearing upon the question, was the petitioner, Thomas Bruce, a fugitive from justice, or whether he considered the sufficiency of the indictment. When the cause was heard in the Circuit Court no testimony was received upon the question, was the petitioner a fugitive from justice. Apparently the court did not go behind the warrant of the governor of Maryland.”

The foregoing is the statement of facts as delivered by Simonton, circuit judge, who, after such statement of facts, then proceeded to give the decision, from which we quote as follows (the emphasizing is our own):

“Was this error on the part of the court? Section 2, Clause 2, Article IV of the Constitution of the United States declares: ‘That the person charged in any state with treason, felony or any other crime who shall flee from justice and be found in another state, shall, on the demand of the executive of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime.’

“Provision for executing the mandate of the Constitution is made in sections 5278-5279, Revised Statutes of the United States. Whenever, however, a person charged with being a fugitive from justice is arrested under a warrant of the governor of the state for delivery to the authorities of the demanding state, *he is entitled to invoke the judgment of the judicial tribunals, either federal or state, by writ of habeas corpus, upon the lawfulness of his arrest and imprisonment.*

Roberts v. Riley, 116 U. S. 94; Robb v. Connolly, 111 U. S. 624; *Ex parte* Hart, 63 Fed. 249. When a demand of this character is made on a governor of a state two questions are presented to him: First, is the person demanded substantially charged with a crime against the laws of the state from whose justice it is alleged that he has fled by an indictment or affidavit properly certified? *Second, is he a fugitive from justice from the state demanding him?*

“The first is a question of law, and as such always open to judicial inquiry on the face of the papers on application for discharge under a writ of habeas corpus. Roberts v. Riley, *supra*. The second is a question of fact, and the issuance of a writ of remand by the governor is *prima facie* and presumptively conclusive of this fact, whether he makes an express finding thereon or not. Roberts v. Riley, *supra*. In this case it is said: ‘How far the decision of the governor on this question of fact may be reviewed judicially in proceedings in habeas corpus, or whether it is not conclusive, are questions not settled by harmonious judicial decisions nor by any authoritative judgment of the Supreme Court of the United States.’

(Note: This question has, since this decision was written, been settled by McNichols v. Pease, *infra*.)

“But the learned judge delivering the opinion treats the conclusion of the governor as *prima facie* and presumptively correct *only until such presumption is overthrown by contrary proof*. To the same effect is *Ex parte* Reggel, 114 U. S. 653. *Both of these cases go into an examination of the facts and coincide in the conclusion of the gov-*

ernor. A fugitive from justice is one who, having committed a crime within a state, *either conceals himself within the state or departs therefrom so that he cannot be reached by ordinary process*. Therefore, in determining whether he be delivered on the demand in which he is charged with crime, it must appear not only that he was properly indicted, *it must also appear that he was within the state when the crime charged was committed, and also that he had concealed himself or had absconded so that he could not be reached by ordinary process*. *Ex parte Reggel*, 114 U. S. 651. *So it would seem that this question of fact is always open to inquiry*. The mere requisition of the governor of the demanding state can not be accepted as conclusive of the fact, ELSE THE ACCUSED PERSON MAY BE REMANDED NOTWITHSTANDING THE INCONTESTABLE PROOF THAT HE HAD NEVER BEEN WITHIN THE STATE WHOSE EXECUTIVE IS DEMANDING HIM. *Ex parte Reggel*, 114 U. S. 652. IT IS CLEAR, THEREFORE, THAT THIS FACT IS OPEN TO PROOF AND EXAMINATION. *Hyatt v. New York*, 23 Sup. Ct. 456. *And if one fact which constitutes the term 'fugitive from justice' can be inquired into, why should not the other facts equally necessary be also inquired into?*
* * * As is said in *Hyatt v. New York*, *supra*, 'If upon a question of fact made before the governor which he ought to decide, there were evidence pro and con, the court might not be justified in reversing the decision of the governor upon the question. In a case like that, where there was some evidence sustaining the finding, the courts *might* regard the decision of the governor as conclusive.' *In the case at bar* (as in the instant

case) *the record* does not disclose whether any evidence was offered before the governor of Maryland (or California) or whether he acted solely on the requisition. In the case of *In re Cook* (C. C.), 49 Fed. 841, Jenkins, J., speaking for the Circuit Court of Appeals, said: 'It is essential to compliance with such executive demand that the person whose surrender is demanded be adjudged a fugitive from justice of the demanding state. *The decision of the executive is not conclusive of that fact, and so we are of the opinion that the action of the executive is reviewable by federal tribunals, and it is competent for the court to determine whether in fact the demanded person is a fugitive from justice.*' * * * An important question in this connection is what kind of testimony can be admitted. * * * (Here follows a copy of the indictment.)

"It is stated in the petition of Thomas Bruce that he was living in New Jersey anterior to and at the time of the commission of the crime charged in the indictment, and that he continued to live in the state of New Jersey, occasional absences for business excepted, up to December, 1900. DOES THIS ALLEGATION GO TO THE SUFFICIENCY OF THE INDICTMENT? IS IT A MATTER OF DEFENSE OR IS IT AN ALLEGATION BEARING UPON THE QUESTION IS HE A FUGITIVE FROM JUSTICE? * * * A statute of the same state of New Jersey (General Stat., page 1145, section 130) declares as follows: 'Nor shall any person be prosecuted, tried or punished for any offense not punishable by death (of which bigamy is one), unless the indictment shall be found within two years from the time of committing the offense. * * * Pro-

vided, further, that nothing herein contained shall extend to any person fleeing from justice.' The indictment in this case, as we have seen, was found September term, 1902, and charges bigamous marriage of the petitioner as of the 11th of March, 1897. It thus appears that in order to prosecute, try or punish one charged with bigamy in New Jersey, it must appear that he or she having a wife or husband living has been guilty of the act of marriage to another person within two years of the finding of the indictment, and that unless such indictment is so brought within said two years the prosecution will not lie unless the person accused is a fugitive from justice. Now, we have seen that to make one a fugitive from justice it must appear, first, that he was within the state when the crime charged is alleged to have been committed; second, THAT BEING AMENABLE TO CRIMINAL PROCESS, EITHER CONCEALS HIMSELF OR AVOIDED IT SO THAT IT COULD NOT BE SERVED, OR THAT HE DEPARTED THE STATE AND SO AVOIDED SERVICE. IF, THEREFORE, IT COULD BE SHOWN THAT HE DID NOT CONCEAL HIMSELF WITHIN THE STATE DURING THE PERIOD WHICH HE WAS AMENABLE TO CRIMINAL PROCESS, THIS WOULD BE EVIDENCE TENDING TO ESTABLISH THE FACT THAT HE WAS NOT FUGITIVE FROM JUSTICE. *This testimony would not go to the sufficiency of the indictment or to any manner of defense. It would be directed solely to the question whether he was a fugitive from justice on question of fact.* The court, as has been seen, can inquire whether the accused was within the state at the date of the alleged crime, and, pursuing its inquiry, it can ascertain if, being within the state at that time,

he remained within reach of criminal process during the whole period for which such process would run. IF THIS BE ESTABLISHED, THEN IT COULD REASONABLY BE CONCLUDED THAT HE IS NOT A FUGITIVE FROM JUSTICE AND SO NOT WITHIN THE PROVISIONS OF THE CONSTITUTION OR THE ACT OF CONGRESS. IT IS NOT A QUESTION OF PLEADING PRESENTED TO THE COURT ON THE TRIAL OF THE ACCUSED, AS IN UNITED STATES V. COOK, 17 Wall. 168, BUT A QUESTION OF FACT TO BE DISPOSED OF BEFORE REMANDING THE ACCUSED TO THE DEMANDING STATE. (Note: The same remarks apply to *Pierce v. Creedy*, 210 U. S. 387, where no offer of testimony was made, the attack being directed solely to the pleading.) HE CANNOT BE REMANDED UNLESS HE BE A FUGITIVE FROM JUSTICE.

“To sum up, we are of the opinion that the Circuit Court hearing the case on the petition, return and replication in habeas corpus, could judicially inquire into the sufficiency of the indictment under which the petitioner was demanded (Ex parte Hart, 63 Fed. 249); that it could also judicially inquire into the facts bearing upon the question whether the petitioner was or was not a fugitive from justice, and that the court erred in not permitting testimony to be introduced touching this question. IT IS ORDERED THAT THE CAUSE BE REMANDED TO THE CIRCUIT COURT WITH INSTRUCTIONS TO RECEIVE SUCH TESTIMONY AS WILL PROPERLY BEAR UPON THE QUESTION WHETHER OR NOT THE PETITIONER IN THIS CASE WAS A FUGITIVE FROM JUSTICE.”

It seems to us that the facts in the case at bar and in the case of *Bruce v. Rayner* are almost identical.

The instant case comes up from the District Court of the United States, Southern District of California, and the objections are based upon the same grounds as in the case of *Bruce v. Raynor*, to-wit:

1. That the indictment does not charge a crime and is therefore illegal, null and void, and without reasonable or adequate foundation in law or in fact, or probable cause; and,

2. That the court erred in excluding testimony offered by the petitioner for the purpose of showing that for the statutory period succeeding the offense the petitioner was a resident of the demanding state and was not without the reach of criminal process in said state, for the petition distinctly shows [see page 6 of Transcript] “that the said Ernest C. Reed was for more than three years (being the statutory period) following the commission of said alleged offense set forth in said indictment, publicly a resident within the state of Iowa.”

And the petition further avers [see page 6 of Transcript of Record] “that said requisition and said executive warrant issued by the governor of the state of California should not have been issued, for the reason that the said Ernest C. Reed is not now and was not at the time said requisition and the said governor’s warrant were issued, nor at the time of finding said indictment, a fugitive from justice under section 5278 of the United States Revised Statutes.”

And further, if we use the language of the *Bruce-Rayner* case, merely substituting names, the substitu-

tions being in italics, we would then find the following language as appears on page 483 thereof, to-wit:

“In the case at bar the record does not disclose whether any evidence was offered before the governor of *California*, or whether he acted solely on the requisition.”

And quoting further from page 485, with the same change of names, etc., the language would then be as follows:

“It is stated in the petition of *Ernest C. Reed* that he was living in *Iowa* * * * at the time of the commission of the crime charged in the indictment, and that he continued to live in the state of *Iowa* for more than three years thereafter. * * * A statute of the same state of *Iowa* (*Annotated Code of Iowa, 1897, section 5163*), ‘*A prosecution for murder may be commenced at any time after the death of the person killed.*’ *Section 5164.* ‘*An indictment for a public offense may be found within eighteen months after its commission in the following cases, and not after: 1, taking or enticing away an unmarried female under the age of consent, for the purpose of marriage or prostitution; 2, seducing or debauching an unmarried female of previously chaste character; 3, for rape or adultery; 4, for an assault with intent to commit a rape. Section 5165. In all other cases an indictment for a public offense must be found within three years after the commission thereof, and not afterwards. Section 5167. If, when the offense is committed, the defendant is out of the state, the indictment or prosecution may be found or commenced within the time herein limited after his coming into the state*

and no period during which the party charged was not publicly a resident within the state is a part of the limitation. The indictment in this case, as we have seen, was found *September 25, 1914*, and charges crime of false pretenses on *June 7, 1909*. It thus appears that in order to prosecute, try or punish one charged with *cheating by false pretenses in Iowa* it must appear that he or she has been guilty of the crime and that unless such indictment is so brought within said period of *three years* the prosecution will not lie, unless the person *be not publicly a resident of the state* for that length of time after the commission of the offense. * * * If, therefore, it could be shown that he did not conceal himself within the state during the period which he was amenable to criminal process, this would be evidence tending to establish the fact that he was not a fugitive from justice.”

And why should a mere statement in the indictment itself [Transcript page 17] that “said Grand Jury further alleges that said Ernest C. Reed has not been publicly a resident within the state of Iowa during the period of time from June 7, 1909, until the present time, the date of the return of this indictment,” be any more conclusive than a statement by the Honorable Hiram W. Johnson, Governor of California, appearing on page 8 of said Transcript, to-wit: “and it satisfactorily appearing that the representations of the Governor of Iowa are true and that the said Ernest C. Reed is a fugitive from the justice of the said state of Iowa,” or the statement of the Governor of Iowa

as contained on page 11 of said Transcript, "that he (Ernest C. Reed) has fled from this state and is a fugitive from the justice thereof." Especially is this true when the Circuit Court of Appeal has said in the Bruce-Rayner case, on page 483:

"Therefore, in determining whether he be delivered on demand of the state in which he is charged with crime, it must appear not only that he was properly indicted; it must also appear that he was within the state at the time the crime charged was committed and also that he has concealed himself or had absconded so that he could not be reached by ordinary process. So it would seem that the question of fact is always open to inquiry. THE MERE REQUISITION OF THE GOVERNOR OF THE DEMANDING STATE CANNOT BE ACCEPTED AS CONCLUSIVE OF THE FACT, ELSE THE ACCUSED PERSON MAY BE REMANDED, NOTWITHSTANDING INCONTESTABLE PROOF THAT HE HAD NEVER BEEN WITHIN THE STATE WHOSE EXECUTIVE IS DEMANDING HIM."

And the above conclusion, to-wit, that the governor's warrant or demand is not conclusive, has been decided by the state of Iowa itself in *Jones v. Leonard*, 50 Iowa 106, 110, in which the court says:

"The governor of this state is not clothed with judicial powers and there is no provision of the Constitution or laws of the United States or of this state which provides that his determination is final and conclusive, in the case of an extradition of a citizen. In the absence of such a provision we hold that the decision of the governor only makes a *prima facie* case. That it is competent

for courts in a proceeding of this character (habeas corpus) to inquire into the correctness of his decision and discharge the prisoner.”

The whole question seems to turn upon the question as to whether or not a man had departed from the state so as not to be amenable to its criminal process. If he remained within the state for such a period of time that action on the alleged offense becomes barred, then he could not lawfully be amenable to the process of the court of that state, and therefore if he departs from that state afterwards, he certainly is not a fugitive from justice. For to be a fugitive from justice he must be in the position of being amenable to a state's criminal process lawfully issued and lawfully to be executed, and the following language from the case of Hyatt v. New York etc., 188 U. S. 713, is quite in point:

“In other words, the appellant was entitled under the Acts of Congress to insist upon proof that he was within the demanding state at the time he is alleged to have committed the crime charged, and subsequently withdrew from her jurisdiction *so that he could not be reached by her criminal process.* The statute, it is to be observed, does not prescribe the character of such proof but that the executive authority of the territory was not required by the Act of Congress, to cause the arrest of appellant, and his delivery to the agent appointed by the Governor of Pennsylvania, *without proof of THE FACT that he was a fugitive from justice,* is, in our judgment, clear from the language of that act. Any other interpretation would

lead to the conclusion that the mere requisition by the executive of the demanding state, accompanied by the copy of the indictment, or an affidavit before a magistrate, certified by him to be authentic, charging the accused with crime committed within her limits, imposes upon the executive of the state or territory where the accused is found, the duty of surrendering him, ALTHOUGH HE MAY BE SATISFIED, FROM INCONTESTABLE PROOF, THAT THE ACCUSED HAD IN FACT NEVER BEEN IN THE DEMANDING STATE AND THEREFORE COULD NOT BE SAID TO HAVE FLED FROM ITS JUSTICE. UPON THE EXECUTIVE OF THE STATE IN WHICH THE ACCUSED IS FOUND RESTS THE RESPONSIBILITY OF DETERMINING IN SOME LEGAL MODE WHETHER HE IS A FUGITIVE FROM JUSTICE OF THE DEMANDING STATE. HE DOES NOT FAIL IN DUTY IF HE MAKES IT A CONDITION PRECEDENT TO THE SURRENDER OF THE ACCUSED THAT IT BE SHOWN TO HIM, BY COMPETENT PROOF, THAT THE ACCUSED IS IN FACT A FUGITIVE FROM JUSTICE OF THE DEMANDING STATE.”

In the case of *McNichols v. Pease*, 207 U. S. 109, the Supreme Court of the United States lays down the rules which govern extradition and the application of *habeas corpus* to extradition, and on page 109 uses the following language:

“4. Whether the alleged criminal is or not such fugitive from justice may, so far as the Constitution and the laws of the United States are concerned, be determined by the executive upon whom the demand is made in such a way as he deems satisfactory and is not obliged to demand

a proof apart from proper extradition papers from the demanding state, that the accused is a fugitive from justice.

5. If it be determined that the alleged criminal is a fugitive from justice, whether such determination is based upon the requisition and the accompanying papers in proper form, or after an original independent inquiry into the facts, and if a warrant of arrest is issued after such determination, the warrant will be regarded as making a *prima facie* case in favor of the demanding state and as requiring the removal of the alleged criminal to the state in which he stands charged with crime, UNLESS IN SOME APPROPRIATE PROCEEDING IT IS MADE TO APPEAR THAT HE IS NOT A FUGITIVE FROM JUSTICE OF THE DEMANDING STATE.

5. *A proceeding by habeas corpus* in a court of competent jurisdiction IS APPROPRIATE for determining whether the accused is subject, in virtue of the warrant of arrest, to be taken as a fugitive from the justice of the state in which he is found to the state whose laws he is charged with violating.

7. One arrested and held as a fugitive from justice is entitled of right upon *habeas corpus* TO QUESTION THE LAWFULNESS OF HIS ARREST AND IMPRISONMENT, SHOWING BY COMPETENT EVIDENCE AS A GROUND FOR HIS RELEASE, THAT HE WAS NOT, WITHIN THE MEANING OF THE CONSTITUTION AND LAWS OF THE UNITED STATES, A FUGITIVE FROM THE JUSTICE OF THE DEMANDING STATE, THEREBY OVERCOMING THE PRESUMPTION TO THE CONTRARY ARISING FROM THE FACE OF AN EXTRADITION WARRANT."

The United States Circuit Court of Appeal in the Bruce-Rayner case has specifically held as above quoted that the Statute of Limitations and evidence thereon showing whether or not the statute has run, goes not to a matter of defense but purely to the question of whether or not a person is a fugitive from justice. Or, to put the matter in the language of the court itself, page 485:

“IF, THEREFORE, IT SHOULD BE SHOWN THAT HE DID NOT CONCEAL HIMSELF WITHIN THE STATE DURING THE PERIOD WHICH HE WAS AMENABLE TO CRIMINAL PROCESS, THIS WOULD BE EVIDENCE TENDING TO ESTABLISH THE FACT THAT HE WAS NOT A FUGITIVE FROM JUSTICE. THIS TESTIMONY WOULD NOT GO TO THE SUFFICIENCY OF THE INDICTMENT OR TO ANY MANNER OF DEFENSE; IT WOULD BE DIRECTED SOLELY TO THE QUESTION WHETHER HE WAS A FUGITIVE FROM JUSTICE—A QUESTION OF FACT.”

This, then, surely comes within the seventh rule laid down in McNichols v. Pease, *supra*, to-wit:

“One arrested and held as a fugitive from justice is entitled of right, upon *habeas corpus*, to question the lawfulness of his arrest and imprisonment, *showing by competent evidence, as a ground for his release, that he was not, within the meaning of the Constitution and laws of the United States, a fugitive from the justice of the demanding state*, and thereby overcoming the presumption to the contrary arising from the face of an extradition warrant.”

Wherefore appellant submits:

1. That the indictment does not, nor does any document in connection therewith “charge the appellant with a crime” against the laws of the state of Iowa, and therefore appellant should have been discharged from custody and his bail exonerated, and it should now be so ordered by this court.

2. In any event, the district judge erred in refusing to admit testimony showing that appellant was not a fugitive from justice from the state of Iowa, in this, that the appellant was, for more than three years after the commission of the alleged offense, publicly a resident within the state of Iowa, was during that time constantly in reach of all process of the state of Iowa, both civil and criminal, and prosecution upon said alleged offense was barred by the statute of limitations of the state of Iowa and hence appellant was not and could not be a fugitive from justice from said state.

In consequence, even in the event the court should hold that a crime was “charged,” yet for the foregoing reasons the case should be remanded to the District Court with instructions to take the testimony proffered by appellant.

Respectfully submitted,

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United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Ernest C. Reed,

Appellant,

vs.

United States of America, Charles
E. Sebastian, Chief of Police of
the City of Los Angeles, and
Patrick J. Phelan Agent of the
State of Iowa,

Appellees.

IN THE MATTER OF THE APPLICATION OF ERNEST C.
REED FOR A WRIT OF HABEAS CORPUS.

REPLY BRIEF OF APPELLEES.

PERCY V. HAMMON and
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IN THE MATTER OF THE APPLICATION OF ERNEST C.
REED FOR A WRIT OF HABEAS CORPUS.

REPLY BRIEF OF APPELLEES.

This is an appeal from an order of the United States District Court for the Southern District of California, discharging a writ of habeas corpus sued out in behalf of the appellant and remanding him to custody. The application for the writ was based upon the assertion that the indictment found by the county in which the crime is alleged to have been committed and under which petitioner as appellant here is restrained, and which was presented to the governor of the state of

California for the purpose of extraditing the petitioner to the state where the crime is alleged to have been committed, did not charge him with the commission of a crime against the laws of the demanding state, and upon the further ground that the said District Court erred in refusing to permit petitioner to prove that he was not a fugitive from justice from the laws of the demanding state. In order that a writ might be obtained from the federal court, the application was based upon the assertion that petitioner was not a fugitive under the provisions of section 5278, U. S. Revised Statutes. Presumably, his application was based upon the theory that he was restrained of his liberty without due process of law, and was not a fugitive within the provisions of article IV, section 2, clause 2, of the Constitution of the United States. This appeal is prosecuted to this court as a writ of error and a motion to dismiss the appeal has been regularly served and filed, as required by the rules of this court, noticed for hearing upon the day fixed by this Honorable Court for the hearing of this appeal, said motion to dismiss being based upon the claim that this appeal, because it involves the construction and application of certain provisions of the Constitution of the United States, as well as the constitutionality of a law of the United States, should have been taken directly to the Supreme Court of the United States and that, therefore, this Honorable Court is without jurisdiction to entertain or hear the said appeal.

Without waiving the motion to dismiss the appeal or the right to be heard thereon, and without abating

in the least our contentions that the appeal has been improperly taken, we offer the following suggestions and authorities in answer to the opening brief filed by appellant.

Two errors are assigned by appellant.

1. That the lower court erred in declining to hold that the indictment found by the grand jury of the county where the offense is claimed to have been committed did not properly and legally charge the prisoner with a crime.

2. That the lower court erred in excluding testimony for the purpose of showing that a prosecution for the crime was barred by the provisions of the statute of the state where it was committed for the reason that petitioner was publicly a resident of the state for more than three years after the alleged commission of the crime and, therefore, is not a fugitive from justice.

In answer to the first assignment of error, it must be remembered that upon the hearing under a writ of habeas corpus, this court will not consider whether the evidence was sufficient upon which to found an indictment, but the inquiry is limited to the question whether the indictment upon its face states a public offense. The writ of habeas corpus may not be used, either for the purposes of a demurrer or as a writ of error, to review the findings of the lower court, or to review the conclusions and determination of a governor when issuing a warrant of rendition upon the demand of the executive of another state.

Furthermore, it should be remembered that the question whether the indictment sufficiently charges an

offense is for the courts of the state where the indictment was laid, to decide.

Bergmann v. Backer, 157 U. S. Rep. 655 (39 L. Ed. 845);

Kohl v. Lehlback, 160 U. S. Rep. 293 (40 L. Ed. 432).

As was well said by the court *In re Reggel*, 114 U. S. 642 (29 L. Ed. 250):

“Each state has the right to prescribe the forms of pleading and process to be observed in her courts, subject only to those provisions of the National Constitution designed for the protection of life, liberty and property. Hence, in a case involving the surrender of a fugitive from justice, it may not be objected that the indictment is not framed according to the technical rules of criminal pleading, if it conforms substantially to the laws of the demanding state.”

Therefore, it is necessary to consider the statutes of the state of Iowa and the decisions of the Supreme Court of that state for the purpose of determining whether the indictment in the instant case charges a public offense.

The indictment, set forth on pages 15, 16 and 17 of the transcript of record, was laid pursuant to the provisions of section 5041 of the Annotated Code of 1897 of the state of Iowa, which reads as follows:

“Section 5041. False Pretenses.—If any person designedly and by false pretense, or by any privy or false token, and with intent to defraud, obtain from another any money, goods, or other prop-

erty, or so obtain the signature of any person to any written instrument, the false making of which would be punished as forgery, he shall be imprisoned in the penitentiary not more than seven years or be fined not exceeding five hundred dollars, or imprisoned in the county jail not exceeding one year, or both such fine and imprisonment.”

This statute does not describe a crime known as that of cheating by false pretenses, counsel for appellant to the contrary notwithstanding. The offense described is that of obtaining, by false pretense and with intent to defraud, the money, goods or property of another person. This being true, only two facts are necessary to be set out in the indictment.

1. That the prosecuting witness has been deprived of his money or goods or other property.
2. That such was obtained from him by the accused designedly and by false pretenses.

Measured by this test, let us examine the indictment. It appears upon the face thereof that the petitioner is accused of obtaining from one Sargent a certain draft drawn on an Iowa bank for a certain sum of money, and further, that this property was obtained designedly and by means of false pretenses and with intent to defraud. It further appears that the false pretenses consisted in the present representation of a material fact, to-wit: the fact that the accused was then the owner of a tract of land, which was free and clear of incumbrance, when in truth and in fact he did not own the said property and the same was not free or clear of incumbrance. We submit that the statement of

these facts meets every requirement of the statute under which the indictment was laid.

It is urged by counsel for petitioner, in the first place, that the indictment does not *charge* any offense known to the law, and that all of the elements of the offense must be present. That because the indictment charges the crime of false pretenses instead of the crime of cheating by false pretenses, the accused has not been legally charged with an offense.

The Supreme Court of the state of Iowa has held that an indictment describing an offense in the language of the statute without naming it is sufficient, although naming the offense without stating the facts constituting the crime will not be sufficient. The wrong name given to an offense in which the facts are properly stated will not vitiate the indictment, but is mere surplusage.

State v. Shaw, 35 Iowa 575;

State v. Davis, 41 Iowa 311;

State v. Wyatt, 76 Iowa 328.

It is further urged by counsel for appellant that because the indictment fails to state that Sargent, when defrauded of his property, intended to part with his title thereto, it states the crime of larceny and not that of cheating by false pretenses.

In answer to this contention, it must be remembered that the indictment specifically states that the draft was endorsed by him, prior to delivery to the accused. No citation of authorities is needed to sustain the principle of law that an endorsement and de-

livery of a negotiable instrument are sufficient to pass the title thereto. When the indictment states upon its face that the draft was endorsed by him, this is tantamount to a statement that title thereto passed and is sufficient to differentiate the offense from that known as larceny.

Furthermore, when the indictment states upon its face that he endorsed the draft, this was a sufficient allegation to show his intention to part with his title thereto.

It is further claimed by counsel for petitioner that the indictment does not state a public offense for the reason that it does not show that any person has been defrauded. This is urged, presumably, because the indictment is silent upon the question whether the accused deeded the real property in question to Sargent at the time he endorsed and delivered the draft to the accused, and because the indictment fails to state that there was any other consideration moving from the accused to Sargent, or that he has been compelled to assume and pay off the incumbrance upon the land which was represented to be free and clear of incumbrance.

The answer to this contention is found in the words of the statute under which the indictment was laid. It does not appear from the statute that any consideration should move from the accused to the prosecuting witness in order to make a complete crime. It is enough if it appear upon the face of the indictment that the property of the prosecuting witness was obtained by any fraudulent misrepresentation. The

crime would have been complete under the statute, even though the accused never in fact deeded the real property to the prosecuting witness.

Upon the question whether the draft was a valuable thing, and therefore whether Sargent was actually defrauded out of anything of value, it is necessary for this Honorable Court to consider the provisions of section 4849 of the Annotated Code of 1897 of the state of Iowa, which statute is set forth at length as follows:

“Section 4849. If the property stolen consists of any bank note, bond, bill, covenant, bill of exchange, draft, order, or receipt, or any evidence of debt whatever, or any public security, or any instrument whereby any demand, right or obligation may be assigned, transferred, created, increased, released, extinguished or diminished, the money due thereon or secured thereby and remaining unsatisfied, or which in any event or contingency might be collected thereon, or the value of the property transferred or affected, as the case may be, shall be adjudged the value of the thing stolen.”

It will appear that the money due upon this draft is the value thereof and when the indictment upon its face states that the amount of the draft was \$5537.00, it showed that Sargent, when he endorsed and delivered the same to the accused, parted with a thing of value, worth the sum of money represented upon the face thereof.

Furthermore, the technical exactness of the common law which requires an exact statement of the offense

charged has been superseded by statutory provisions. It is enough to state the facts constituting the offense in ordinary and concise language in such a manner as to enable a person of common understanding to know what is intended.

Section 5280 of the Annotated Code of 1897 of Iowa is as follows:

“Section 5280. The indictment must contain:

“1. The title of the action, giving the name of the court to which it is presented and the names of the parties;

“2. A statement of the facts constituting the offense in ordinary and concise language without repetition and in such manner as to enable a person of common understanding to know what is intended.”

Furthermore, by statute, the state of Iowa has prescribed what is sufficient to sustain the indictment.

Section 5289 of the Annotated Code of 1897 of the state of Iowa is as follows:

“Sec. 5289. The indictment is sufficient if it can be understood therefrom:

“1. That it was found by a grand jury of the county impaneled in the court having authority to receive it, though the name of the court is not actually stated.

“2. That the defendant is named, or if his true name is unknown to the grand jury, such fact is stated and that he is described by a fictitious name.

“3. That the offense is triable within the jurisdiction of the court.

“4. That the offense was committed prior to the time of the finding of the indictment.

“5. That the act or omission charged as the offense is stated in ordinary and concise language with such certainty and in such manner as to enable a person of common understanding to know what is intended and the court to pronounce judgment according to law upon a conviction.

“6. That, when material, the name of the person injured or attempted to be injured, be set forth when known to the grand jury, or if not known, that it be so stated in the indictment.”

Furthermore, the legislature of that state has further prescribed that indictments shall not be insufficient because of the failure to state, with all the nicety of common law, the offense charged.

Section 5290 of the Annotated Code of 1897 of the state of Iowa, omitting such portions thereof as are not material to this argument, is as follows:

“Sec. 5290. Immaterial Matters.—No indictment is insufficient * * * by reason of any of the following matters:

“1. * * *

“2. * * *

“3. * * *

“4. For any surplusage or repugnant allegation or for any repetition when there is sufficient matter alleged to indicate clearly the offense and the person charged.

“5. * * *”

It has been held that ordinary language is sufficient if a person of common understanding may know therefrom what is intended.

State v. Stanley, 33 Iowa 526;

Bayard v. Baker, 76 Iowa 220;

State v. Coffrey, 62 N. W. 664 (Ia.).

Inasmuch as the Supreme Court of the United States has held that each individual state may prescribe its own forms of pleading and process, the proper determination of the questions involved upon this appeal require that the matters presented be determined in light of the statutes and decisions of that state.

Munsey v. Clough, 196 U. S. Rep. 273 (49 L. Ed. 515).

Briefly, we have tried to answer the points urged by counsel for appellant under their first specification of error and, briefly, have endeavored to reply to the points made by them in support of their claim of insufficiency of the indictment. These observations upon our part have been made without abating in the least our position that the question of the sufficiency or insufficiency of the indictment cannot be raised upon an appeal in habeas corpus. This Honorable Court should remember, therefore, that we have endeavored to reply to the position of counsel for fear that our silence in that behalf may be misconstrued. We do not believe that the question whether the indictment was sufficient can now be urged. None of the cases cited by counsel for appellant go so far as to hold that an appellate

court upon an appeal from a hearing under habeas corpus can determine whether the indictment which was presented to the governor of the extraditing state was sufficient or not. At this time we again urge that the appeal should be dismissed for want of jurisdiction, and reserve the right to present authorities in that behalf upon the hearing of the motion to dismiss the appeal. We believe that under the decisions, the judgment of the executive of the state upon whom a demand has been made for the surrender of a fugitive, as to the sufficiency of the indictment which has been presented to him is final, not only as to that question, but as to the question whether the accused is in fact a fugitive, and that this determination by the executive cannot be reviewed in the courts. Whether our position be sound upon the question whether the courts may inquire into the question of fact as to whether the accused is a fugitive or not, there can be no question but that the courts may not inquire into the sufficiency of the indictment, this question having once been determined by the executive of the state. The executive of the surrendering state cannot be controlled in the discharge of his duties in that behalf. It is for him to determine whether he will regard the requisition papers as sufficient proof that the accused has been charged with an offense.

Marbles v. Creecy, 215 U. S. Rep. 63 (54 L. Ed. 92.)

This principle of law grows out of the fact that the constitutional provision relating to fugitives from justice, is, as stated in the cases, in the nature of a treaty

stipulation entered into for the purpose of securing a prompt and efficient administration of the criminal laws of the several states and while a state should protect its people against illegal action, federal courts should be equally careful that the provision be not so narrowly interpreted as to enable those who have offended the laws of one state to find a permanent asylum in another.

Appleyard v. Massachusetts, 203 U. S. Rep. 222
(51 L. Ed. 161).

Furthermore, that article of the Federal Constitution which provides for extradition requires nothing more than that there should be a charge of crime and an indictment which clearly describes the crime charged is sufficient even though it may possibly be bad as pleading, and the federal courts cannot on *habeas corpus* inquire into the truth of an allegation presenting mixed questions of law and fact in the indictment on which the demand for extradition is based.

Pierce v. Creecy, 210 U. S. 387 (52 L. Ed.
1113).

Recognizing the fact that the question whether the indictment be good or bad as a pleading cannot be presented in this matter, counsel for appellant attack the indictment upon the ground that it is bad as not stating an offense, but in so doing, proceed to urge reasons, which in themselves relate wholly to the sufficiency of the indictment as a pleading.

As is well said by Mr. Justice Moody, in the case last above cited:

“The distinction between these two kinds of attack, though narrow, is clear. But it will not do to disclaim the right to attack the indictment as a criminal pleading and then to proceed to deny that it constitutes a charge of crime for reasons that are apt only to destroy its validity as a criminal pleading. There must be objections which reach deeper into the indictment than those which would be good against it in the court where it is pending.”

It will be apparent to this court at once that all of the reasons which are here urged by counsel for appellant why the indictment was insufficient are reasons which can and should only be urged in the court where the indictment is laid for the purpose of having a judgment of that court as to its sufficiency.

It is urged in the second specification of error, that the lower court erred in excluding testimony offered by petitioner for the purpose of showing that he is not a fugitive from justice from the state of Iowa, and in that behalf that the court erred in rejecting testimony for the purpose of showing that the petitioner was publicly a resident within that state for more than the period prescribed by the statute of limitations, after the commission of the alleged crime, and counsel have cited and urged with much force, a number of authorities in support of their contention.

At the outset, it must be remembered that it is not necessary, in order that the accused be a fugitive, that he have *consciously* fled from the demanding state in order to avoid prosecution for the crime with which he is charged. It has been repeatedly held that it is not

necessary that the fleeing take place after indictment found, in order to make the person a fugitive. The fact that the offense here was committed in June, 1909, and the indictment not returned until November, 1914, should not mislead the court.

“A person charged by indictment before a magistrate with a commission within a state of crime covered by its laws and who, after the date of the commission thereof, leaves the state, no matter for what purpose or with what motive, or under what belief becomes from the time of such leaving and within the meaning of the Constitution and the laws of the United States, a fugitive from justice and if found in another state, must be delivered up by the governor of such state to the state whose laws are alleged to have been violated, on the production of such indictment or affidavit certified as authentic by the governor of the state from which the accused deserted.”

These are the words of Mr. Justice Harlam, in the opinion of the court in *Appleyard v. Mass.*, *supra*. This principle of law has been repeatedly announced in other decisions of the Supreme Court of the United States, and the rule is so well settled that we will not burden the court with any citation of authorities. It is not necessary that the accused have left the state in which the crime is alleged to have been committed after an indictment found or for the purpose of avoiding a prosecution anticipated or begun, but simply that, having within a state committed that which by its laws constitutes a crime when he is sought to be subjected to its criminal process to answer for his offense, he has left its jurisdiction and is found within the territory of another.

Roberts v. Reilly, 116 U. S. 80 (29 L. Ed. 544).

In the next place, it must be remembered that the indictment upon its face affirmatively shows that the accused has not been publicly a resident within the state of Iowa during the period of time from the date of the commission of the offense until the time of the return of the indictment.

Counsel for appellant have, on page 20 of their brief, set forth at length section 5167, Annotated Code of 1897 of the State of Iowa, which is a statute which must be considered and read in connection with the statute of limitations, and they lay much stress upon the decision of the Circuit Court of Appeal for the Fourth Circuit, in the case of *Bruce v. Rayner*, 124 Federal Reports 481. This case can easily be distinguished from the case at bar and because of the distinction to be drawn, loses its force and efficacy as presenting a rule to be followed in the case at bar. In *Bruce v. Rayner*, the indictment upon its face showed affirmatively that the prosecution was barred under the provisions of the laws of the state in which the offense was committed. Of course, under such circumstances, it was competent for the petitioner to show that he had remained in the state without being concealed for a period of time greater than that prescribed for the statute of limitations. That being true, evidence that he had remained within the demanding state for such a period of time did not go to any matter of defense and tended to prove that the defendant was not a fugitive.

In the case at bar, however, the indictment affirmatively shows upon its face that the offense with which

petitioner is charged is not barred by the statute of limitations for the reason given in the indictment itself. To permit the accused in this case at the time of the hearing in the court below to have shown that he was publicly a resident within the state of Iowa for three years and more subsequent to the alleged commission of the offense, would be clothing a writ of *habeas corpus* with the functions of a writ of error. The tribunal to determine whether the accused was publicly a resident within the state of Iowa for the period claimed or not is the court of that state. It is purely a question of fact and not one of law and the Constitution never intended that a writ of *habeas corpus* should be used in this wise, when the courts of the demanding state are open to the accused, where his rights, it must be presumed, will be safeguarded and justice done.

As was well said by Mr. Justice Holmes in the very recent case of *Drew, Sheriff, v. Harry Kendall Thaw*, decided at the October, 1914, term of the Supreme Court of the United States, on the 21st day of December, 1914, which decision has not as yet been published in bound volumes,

“In extradition proceedings, even when as here a humane opportunity is afforded to test them on *habeas corpus*, the purpose of the writ is not to substitute the judgment of another tribunal upon the facts or the law of the matter to be tried. The Constitution says nothing about *habeas corpus* in this connection, but peremptorily requires that upon proper demand the person charged shall be

delivered up to be removed to the state having jurisdiction of the crime. Article 4, section 2, *Pettibone v. Nichols*, 203 U. S. 192, 205. There is no discretion allowed, no inquiry into motives. *Kentucky v. Dennison*, 24 How. 66; *Pettibone v. Nichols*, 203 U. S. 192, 203. The technical sufficiency of the indictment is not open. *Munsey v. Clough*, 196 U. S. 364, 373. And even if it be true that the argument stated offers a nice question, it is a question as to the law of New York which the New York courts must decide.”

This rule is based upon the theory that the federal courts will not interfere with the administration of the laws by the state courts where those laws are to be applied to facts arising under a violation of a state statute, unless it appears that the rights of an individual under the Constitution of the United States are about to be invaded. Indeed, as it further appears from the opinion in the above entitled case,

“How far such considerations shall be taken into account it is for the New York courts to decide, as it is for a New York jury to determine whether at the moment of the conspiracy, Thaw was insane in such sense as they may be instructed would make the fact a defense. *Pierce v. Creedy*, 210 U. S. 387, 405. *Charlton v. Kelley*, 229 U. S. 447, 462. When, as here, the identity of the person, the fact that he is a fugitive from justice, the demand in due form, the indictment by a grand jury, for what it and the governor of New York allege to be a crime in that state and the reasonable possibility that it may be such, all appear, the constitutionally required sur-

render is not to be interfered with by the summary process of *habeas corpus* upon speculations as to what ought to be the result of a trial in the place where the Constitution provides for its taking place.”

Because the governor of California decided that, upon the showing made to him, the appellant here was a fugitive from justice and should be delivered up to the agent of the demanding state and because of the well-settled policy of the judicial branch of our government not to interfere with the executive branch and because of the authorities above cited, and particularly because this Honorable Court is without jurisdiction to pass upon this appeal, so far as it concerns the construction and application of the Constitution of the United States, which, after all, is the only ground of any merit to be found in this appeal, we urge the court to affirm the ruling and judgment of the District Court made in this matter.

Respectfully submitted,

PERCY V. HAMMON and

C. A. STUTSMAN,

Attorneys for Appellees.

By C. A. STUTSMAN,

Of Counsel for Appellees.

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United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Ernest C. Reed,

Appellant,

vs.

United States of America, Charles
E. Sebastian, Chief of Police of
the City of Los Angeles, and
Patrick J. Phelan, Agent of the
State of Iowa,

Appellees.

PETITION OF ERNEST C. REED FOR REHEARING.

COLLIER, SHELTON & SCHLEGEL,
Attorneys for Petitioner.

AUG 11 1915

F. D. Monckton,

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Ernest C. Reed,

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vs.

United States of America, Charles
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State of Iowa,

Appellees.

PETITION OF ERNEST C. REED FOR REHEARING.

*To the Honorable Justices of the Circuit Court of
Appeals, of the United States, for the Ninth
Circuit:*

Your petitioner in the above entitled cause, to-wit:
Ernest C. Reed, respectfully prays that a rehearing be
granted therein for the following reasons:

PETITIONER RESPECTFULLY URGES THAT THE SAID
COURT IN ITS OPINION ERRED IN CERTAIN OF THE
VITAL STATEMENTS OF FACT.

The first of such mistakes which the petitioner re-
spectfully urges is contained in the last few lines of

page 2 of the typewritten opinion wherein the court makes this statement, in speaking of the petition for writ of *habeas corpus*:

“There is no allegation of diversity of citizenship and no allegation whatever that the petitioner is held in custody in violation of any of the statutes of the United States or of any provision of the federal constitution.”

The attention of the court is particularly directed to the following language contained in the petition for writ of *habeas corpus* and which is set forth on page 6 of the transcript, to-wit:

“(c) That said requisition and said executive warrant issued by the governor of the state of California should not have been issued for the reason that the said Ernest C. Reed *is not now and was not at the time the requisition and the said governor’s warrant was issued, nor at the time of the finding of said indictment, a fugitive from justice under section 5278, United States Revised Statutes.*”

This same matter was mentioned in the Assignment of Error [see page 59 of the transcript], as follows:

“Again that said District Court erred in excluding the testimony offered by petitioner for the purpose of showing that petitioner was publicly a resident within the state of Iowa for more than three years after the alleged commission of the alleged crime set forth in said indictment, and was for more than three years after the alleged commission of said offense not without the reach of criminal process of the state of Iowa AND IS THEREFORE NOT A FUGITIVE FROM JUSTICE.”

The petition for writ of *habeas corpus*, upon which all the proceedings are based, distinctly refers to the fact that defendant was not a fugitive from justice under section 5278, United States Revised Statutes, and thereafter in referring to the matter simply the words "fugitive from justice" were used for the most part, but certainly they referred back to the section of the Revised Statutes above mentioned.

Furthermore, it is respectfully urged upon the court that unless the defendant was a fugitive from justice, no extradition could be had.

Therefore, with all due respect to the statement contained in the opinion, your petitioner asserts that there is a positive allegation that he is held in custody in violation of a statute of the United States, to-wit: section 5278, United States Revised Statutes.

A FURTHER AND BROADER CONSIDERATION IS DUE TO THE QUESTION, "IS PETITIONER A FUGITIVE FROM JUSTICE?"

It is respectfully urged that the court has adopted too limited a view in the following statement on page 5 of said opinion (particular attention being directed to the words in italics):

"To the allegation of the petition that the petitioner was not in fact a fugitive from justice it is sufficient to refer to the language of the indictment, which charges him with the actual commission of the offense in the state of Iowa. *If he was in that state at the time the offense was committed he is, whenever he is thereafter found in another state, presumed to be a*

*fugitive from justice within the meaning of the constitution and the laws of the United States, no matter for what purpose or reason or under what circumstances he left the state. * * * That presumption might be overcome by proof that the petitioner was not in the state of Iowa at the time of the commission of the offense alleged."*

If the opinion in the instant case is to stand, then a man is a fugitive from justice under all conditions and circumstances whatsoever unless it be that he was not in the state at the time of the commission of the crime or of some integral part thereof; and this, no matter whether he may have continued to live in that state and be publicly known and be publicly a resident thereof either one year or fifty years after the crime is committed.

To epitomize the effect of Your Honors' decision:

A man is charged with having committed a crime in San Francisco in 1900.

That crime is barred in three years.

He continues to reside in San Francisco openly and publicly till 1914, all the while amenable to civil and criminal process.

He is unmolested for fourteen years.

In January, 1915, he removes to Maine.

He could not be prosecuted had he remained in California.

Yet by removing to Maine he becomes a "fugitive from justice" and can be extradited willy-nilly without leave to prove the bar of the statute.

Is such a man a fugitive from justice?

Under such conditions will Your Honors' decision stand the "acid test"?

In other words, the petitioner contends that if a crime has been committed within the demanding state and the defendant has been a resident of that state not only for the period allowed by the statute of limitations, but considerably beyond that time, then that the defendant is not a fugitive from justice within the meaning of section 5278 of the United States Revised Statutes.

To hold otherwise would be putting a very strained construction upon that section and upon the constitutional provisions which are its base and foundation.

To hold otherwise would be to say that a man charged with committing a crime upon which the statute of limitations was three years and who had lived publicly within that state for ten years after the alleged commission of the crime and who could not be prosecuted in the demanding state during eleven of those fourteen years, could nevertheless be forthwith extradited from another state to which he had removed after this period of residence merely by virtue of the fact that he had removed from the demanding state and had thus become a fugitive from justice. It seems to us that the absolute injustice of such a course is unanswerable.

In order for Your Honors to sustain that view you must expressly overrule a decision of the United States Circuit Court of Appeals, to-wit: the case of *Bruce v. Raynor*, 124 Fed. 481.

That case IS DIAMETRICALLY OPPOSED TO THE OPINION OF HONORABLE JUSTICE GILBERT IN THE CASE AT

BAR. For that reason we presume it must have been overlooked, for no mention or reference is made to it in the opinion written by Honorable Justice Gilbert. We now desire to call the court's attention to that case and to that case alone in order that the point we are now contending for may be established or discarded and the law laid down in that case shall be either affirmed or overruled.

This is particularly true in view of the language of the Honorable Justice Gilbert on page 4 of the type-written opinion as follows:

“The indictment alleges that the offense was committed on June 7, 1909, and that from that date until the finding of the indictment, which was November 20, 1914, the accused has not been publicly a resident within the state of Iowa. THE QUESTION OF THE ALLEGED BAR OF THE STATUTE OF LIMITATIONS IS ONE THAT SHOULD BE LEFT TO THE DECISION OF THE COURTS OF THAT STATE UPON DEMURRER OR MOTION IN ARREST OF JUDGMENT.”

From this statement it is plainly apparent that the court considered the urging of the bar of the statute to be a matter of defense. If that were not so it could not be raised either by demurrer or a motion in arrest of judgment, but in the case of *Bruce v. Raynor, supra*, it is distinctly declared:

“If, therefore, it could be shown that he (the defendant) did not conceal himself within the state during the period within which he was amenable to criminal process, *this would be evidence tending to establish the fact* THAT HE WAS NOT A FUGITIVE FROM JUSTICE.

This testimony would not go to the sufficiency of the indictment or to any matter of defense. It would be directed solely to the question whether he was a fugitive from justice—a question of fact.”

It is well to reiterate the facts of that case in the language of the opinion itself:

“Thomas Bruce, the appellant, being in the custody of an agent of the state of New Jersey under the warrant of the governor of Maryland, applied to the Circuit Court of the United States for a writ of *habeas corpus*. * * * The writ of *habeas corpus* having been issued, the body of the prisoner was produced and a return made to the writ. This return avers that the prisoner, Thomas Bruce, is lawfully in custody by virtue of a warrant issued to the agent of the state of New Jersey by the governor of the state of Maryland upon the request of the governor of New Jersey, on the ground that said Thomas Bruce is within the state of Maryland as a fugitive from justice of the state of New Jersey under an indictment charging him with bigamy, a crime committed by him within the state of New Jersey against the laws of New Jersey. * * * To his return the petitioner Thomas Bruce replied that he was not lawfully in custody * * * AND ALSO DENYING THAT HE IS A FUGITIVE FROM JUSTICE IN THE SAID STATE. Hearing the return the court discharged the writ and remanded the prisoner to custody. Leave to appeal is granted and cause is here on eight assignments of error. * * * THE SEVENTH AND EIGHTH ASSIGNMENTS OF ERROR CHARGE ERRORS IN THE COURT IN EXCLUDING TESTIMONY OFFERED BY

THE PETITIONER FOR THE PURPOSE OF SHOWING THAT WITHIN THE TWO YEARS SUCCEEDING MARCH 11, 1897, THE DATE CHARGED IN THE INDICTMENT AS THE DATE OF THE ALLEGED OFFENSE, THE PETITIONER WAS A RESIDENT WITHIN THE STATE OF NEW JERSEY AND, EXCEPT AT INTERVALS WHEN ABSENT ON BUSINESS, WAS NOT WITHOUT THE REACH OF CRIMINAL PROCESS IN SAID STATE, AND FURTHER THAT PETITIONER WAS A RESIDENT OF THE STATE OF NEW JERSEY, LIVING THERE EXCEPT AT INTERVALS WHEN ABSENT ON BUSINESS, PRIOR TO SAID ALLEGED OFFENSE UNTIL ABOUT DECEMBER 1, 1890. * * * WHEN THE CAUSE WAS HEARD IN THE CIRCUIT COURT NO TESTIMONY WAS RECEIVED UPON THE QUESTION, WAS THE PETITIONER A FUGITIVE FROM JUSTICE?"

We respectfully submit to the court that the facts in the two cases are so nearly on all fours that particular attention should be paid to the reasoning and decision of the Circuit Court of Appeals therein.

That the parallel may be more clearly set forth we again refer this Honorable Court to the facts in the case at bar.

The petition for the writ of *habeas corpus* in this matter [see page 6 of the transcript] distinctly alleges that "said Ernest C. Reed is not now and was not at the time the said requisition and the said governor's warrant were issued, nor at the time of the signing of said indictment, a fugitive from justice under section 5278, United States Revised Statutes."

The appellees justified under the writ of rendition issued by the Governor of the state of California and

the necessary documents preceding the granting of that writ, all of which are set forth in the transcript. Therefore, the question as to whether or not the petitioner in this matter was a fugitive from justice under section 5278, United States Revised Statutes, was thenceforward constantly before the court.

Pursuant to subdivision A of paragraph II of rule 24 of this court the petitioner sets forth the proceedings had in the court below as follows:

“The said Ernest C. Reed through his counsel then presented the points raised on behalf of said petitioner in paragraph I of said petition, subdivision (a), but was informed by said court that he did not care to hear from counsel thereon but to proceed with the argument on the question of the admissibility of evidence to show the bar of the statute of limitations.

“Under such admonition counsel then passed to the question of the right and duty of said District Court TO ADMIT EVIDENCE FOR THE PURPOSE OF SHOWING THAT THE ALLEGED CRIMINAL OFFENSE, IF ANY THERE WAS, WAS BARRED BY SECTION 5165 OF THE ANNOTATED CODES OF 1897 OF THE STATE OF IOWA. COUNSEL STATED TO THE COURT THAT HE WAS PREPARED TO SHOW BY WITNESSES THEN PRESENT IN THE COURT ROOM AND BY DEPOSITIONS TO BE TAKEN IN IOWA IN THE EVENT THAT THE COURT SHOULD RULE THAT TESTIMONY WAS ADMISSIBLE, THAT THE SAID ERNEST C. REED WAS FOR MORE THAN THREE YEARS AFTER THE ALLEGED OFFENSE WAS COMMITTED PUBLICLY A RESIDENT OF THE STATE OF IOWA; THAT FOR MORE THAN THREE YEARS AFTER SAID ALLEGED OFFENSE WAS COM-

MITTED THE SAID ERNEST C. REED WAS CONSTANTLY WITHIN THE REACH OF THE PROCESS OF THE STATE OF IOWA, BOTH CIVIL AND CRIMINAL, AND FOR THAT REASON SAID ALLEGED OFFENSE WAS BARRED BY THE STATUTE OF LIMITATIONS. THAT SAID EVIDENCE DID NOT GO TO THE DEFENSE OF THE MATTERS CHARGED IN THE INDICTMENT SET OUT IN SAID PETITION BUT WENT ENTIRELY TO THE QUESTION OF FACT ALWAYS OPEN TO PROOF, TO-WIT: WAS THE PETITIONER A FUGITIVE FROM JUSTICE? THAT IF IT COULD BE SHOWN THAT THE PROSECUTION WAS BARRED BY THE STATUTES, THE PETITIONER WAS NOT A FUGITIVE FROM JUSTICE AND THE WRIT OF HABEAS CORPUS SHOULD BE GRANTED AND THE PRISONER DISCHARGED FROM CUSTODY AND HIS BAIL EXONERATED.” [Transcript, pages 4, 5.]

Is it possible for two cases to be more nearly alike in their facts than the instant case and the case of *Bruce v. Raynor*? In this connection we particularly call the court’s attention to the language in the *Bruce-Raynor* case as follows:

“When the cause was heard in the Circuit Court NO TESTIMONY WAS RECEIVED UPON THE QUESTION was the petitioner a fugitive from justice. * * * The seventh and eighth assignments of error charge errors in the court in excluding testimony offered by the petitioner for the purpose of showing” the bar of the statute.

Thus the court will see that the cases are exactly alike. In both cases was testimony offered but not received, and in both cases was it offered for the purpose of showing that the petitioner was not “a fugitive from

justice.” That petitioner in this case did make such offer is shown by the statement of the case, which statement has not been corrected or denied or attacked by the appellees in their brief as required by paragraph 3 of rule 24 of the rules of this court. Therefore, we reiterate that the petitioner is absolutely within the reasoning and decision of the case of *Bruce v. Raynor*.

In view of the foregoing we again quote at length from the opinion.

The court, in speaking of the said seventh and eighth assignments of error, relating to the offer of testimony to prove the bar of the statute of limitation, and commenting upon the fact that no testimony was received upon that question, said:

“Was this error on the part of the court? Section 2, clause 2, article IV of the constitution of the United States declares ‘that the person charged in any state with treason, felony or any other crime, who shall flee from justice and be found in another state shall, upon the demand of the executive of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime.’

“Provision for executing the mandate of the constitution is made in sections 5278-5279, Revised Statutes of the United States. Whenever, however, a person charged with being a fugitive from justice is arrested under a warrant of the governor of a state for delivery to the authorities of the demanding state, he is entitled to invoke the judgment of the judicial tribunals, either federal or state, by writ of *habeas corpus*, upon the lawfulness of his arrest and imprisonment. * * *

When a demand of this character is made on a governor of a state, two questions are presented to him.

* * * Second, IS HE A FUGITIVE FROM JUSTICE FROM THE STATE DEMANDING HIM? * * *

A fugitive from justice is one who, having committed a crime within a state EITHER CONCEALS HIMSELF WITHIN THE STATE or departs therefrom so that he cannot be reached by ordinary process. Therefore, in determining whether he be delivered on the demand in which he is charged with crime, it must appear not only that he was properly indicted, it must also appear that he was within the state when the crime charged was committed AND ALSO THAT HE CONCEALED HIMSELF or had absconded so that he could not be reached by ordinary process.

Ex parte Reggle, 114 U. S. 651. So IT WOULD SEEM THAT THIS QUESTION OF FACT IS ALWAYS OPEN TO INQUIRY. The mere requisition of the governor of the demanding state cannot be accepted as conclusive of the fact, else the accused person may be remanded notwithstanding the incontestable proof that he had never been within the state whose executive was demanding him. *Ex parte Reggle*, 114 U. S. 652. It is clear, therefore, that this fact is open to proof and examination, AND IF ONE FACT WHICH CONSTITUTES THE TERM 'FUGITIVE FROM JUSTICE' CAN BE INQUIRED INTO, WHY SHOULD NOT THE OTHER FACTS EQUALLY NECESSARY BE ALSO INQUIRED INTO?

"As is said in *Hyatt v. New York*, 23 Sup. Ct. 456: 'If upon a question of fact made before the governor which he ought to decide, there were evidence pro and con, the court might not be justified in reversing the

decision of the governor upon the question. In a case like that where there was some evidence sustaining the finding the court *might* disregard the decision of the governor as conclusive.' In the case at bar (as in the instant case) the record does not disclose whether any evidence was offered before the governor of Maryland (or California) or whether he acted solely on the requisition. In the case of *In re Cook*, 49 Fed. 841, Jenkins, J., speaking for the Circuit Court of Appeals, said: 'It is essential to compliance with such executive demand that the person whose surrender is demanded is adjudged a fugitive from justice of the demanding state. THE DECISION OF THE EXECUTIVE IS NOT CONCLUSIVE OF THAT FACT, and so we are of the opinion that the action of the executive is reviewable by federal tribunals AND IT IS COMPETENT FOR THE COURT TO DETERMINE WHETHER IN FACT THE DEMANDED PERSON IS A FUGITIVE FROM JUSTICE.' * * * An important question in this connection is what kind of testimony can be admitted. * * *

"It is stated in the petition of Thomas Bruce that he was living in New Jersey anterior to and at the time of the commission of the crime charged in the indictment and that he continued to live in the state of New Jersey, occasional absences on business excepted, up to December, 1900. DOES THIS ALLEGATION GO TO THE SUFFICIENCY OF THE INDICTMENT? IS IT A MATTER OF DEFENSE OR IS IT AN ALLEGATION BEARING UPON THE QUESTION IS HE A FUGITIVE FROM JUSTICE? * * * (Here follows the New Jersey Statute of Limitations.) The indictment in this case as we have

seen was found September 10, 1902, and charges the bigamous marriage of the petitioner as of the 11th of March, 1897. It thus appears that in order to prosecute, try or punish one charged with bigamy in New Jersey it must appear that he or she having a wife or husband living, has been guilty of the act of marriage to another person within two years of the finding of the indictment, and that unless such indictment is so brought within said two years the prosecution will not lie unless the person accused is a fugitive from justice. Now we have seen that to make one a fugitive from justice it must appear first that he was within the state at the time the crime charged is alleged to have been committed. Second, THAT BEING AMENABLE TO CRIMINAL PROCESS HE EITHER CONCEALS HIMSELF OR AVOIDED IT SO THAT IT COULD NOT BE SERVED, OR THAT HE DEPARTED THE STATE AND SO AVOIDED SERVICE. IF, THEREFORE, IT COULD BE SHOWN THAT HE DID NOT CONCEAL HIMSELF WITHIN THE STATE DURING THE PERIOD WHICH HE WAS AMENABLE TO CRIMINAL PROCESS, THIS WOULD BE EVIDENCE TENDING TO ESTABLISH THE FACT THAT HE WAS NOT A FUGITIVE FROM JUSTICE. THIS TESTIMONY WOULD NOT GO TO THE SUFFICIENCY OF THE INDICTMENT OR TO ANY MANNER OF DEFENSE. IT WOULD BE DIRECTED SOLELY TO THE QUESTION WHETHER HE WAS A FUGITIVE FROM JUSTICE, A QUESTION OF FACT. The court, as has been seen, can inquire whether the accused was within the state at the date of the alleged crime AND PURSUING ITS INQUIRY IT CAN ASCERTAIN IF, BEING WITHIN THE STATE AT THAT TIME, HE REMAINED WITHIN REACH OF

CRIMINAL PROCESS DURING THE WHOLE PERIOD FOR WHICH SAID PROCESS WOULD RUN. IF THIS BE ESTABLISHED THEN IT COULD REASONABLY BE CONCLUDED THAT HE IS NOT A FUGITIVE FROM JUSTICE AND SO NOT WITHIN THE PROVISIONS OF THE CONSTITUTION OR THE ACT OF CONGRESS. IT IS NOT A QUESTION OF PLEADING PRESENTED TO THE COURT ON THE TRIAL OF THE ACCUSED, AS IN UNITED STATES V. COOK, 17 WALL. 168, BUT A QUESTION OF FACT TO BE DISPOSED OF BEFORE REMANDING THE ACCUSED TO THE DEMANDING STATE. HE CANNOT BE REMANDED UNLESS HE BE A FUGITIVE FROM JUSTICE.

“To sum up, we are of the opinion that the Circuit Court hearing the case on the petition, return and replication in *habeas corpus* could judicially inquire into the sufficiency of the indictment under which the petitioner was demanded; THAT IT COULD ALSO JUDICIALLY INQUIRE INTO THE FACTS BEARING UPON THE QUESTION WHETHER THE PETITIONER WAS OR WAS NOT A FUGITIVE FROM JUSTICE, AND THAT THE COURT ERRED IN NOT PERMITTING TESTIMONY TO BE INTRODUCED TOUCHING THIS QUESTION.

“It is ordered that the cause be remanded to the Circuit Court WITH INSTRUCTIONS TO RECEIVE SUCH TESTIMONY AS WILL PROPERLY BEAR UPON THE QUESTION OF WHETHER OR NOT THE PETITIONER IN THIS CASE WAS A FUGITIVE FROM JUSTICE.”

It is therefore respectfully urged that either the reasoning and decision in the case of Bruce v. Raynor is good or it is bad. If it is good, it should be followed.

If it is bad it should be expressly overruled. Particularly in view of the almost exact similarity of the facts in the two cases.

Petitioner therefore earnestly prays Your Honors that a rehearing may be granted in this matter, that the matters herein urged may be given the consideration to which they are entitled in the light of the case of Bruce v. Raynor, *supra*.

Ernest C Reed
.....

Petitioner.

COLLIER, SHELTON & SCHLEGEL,

By *Frank Schlegel*
Attorneys for Petitioner.

CERTIFICATE OF COUNSEL.

Collier, Shelton & Schlegel, attorneys for the petitioner Ernest C. Reed in the foregoing petition for rehearing, do hereby certify and state that in their judgment the foregoing petition for rehearing is well founded, and they further certify and state that the same is interposed in absolute good faith and not for delay.

COLLIER, SHELTON & SCHLEGEL,

By *Frank Schlegel*
Attorneys for Petitioner.

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No. 2568

United States
Circuit Court of Appeals
For the Ninth Circuit.

WILLIAM B. EDWARDS and ROBERT L. CUL-
PEPPER,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the Southern District of California,
Southern Division.

Filed

FEB 15 1915

F. D. Monckton,
Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

WILLIAM B. EDWARDS and ROBERT L. CUL-
PEPPER,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the Southern District of California,
Southern Division.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys.

For Plaintiffs in Error:

HENRY M. WILLIS, Esq., 412-413 Katz
Block, San Bernardino, California; and
J. O. PHILLIPS, Esq., San Bernardino, Cali-
fornia.

For Defendants in Error:

ALBERT SCHOONOVER, Esq., United States
Attorney, Los Angeles, California;
DUKE STONE, Esq., Assistant United States
Attorney, Los Angeles, California; and
J. ROBERT O'CONNOR, Esq., Assistant
United States Attorney, Los Angeles, Cali-
fornia. [3*]

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

UNITED STATES OF AMERICA,

Plaintiffs,

vs.

WILLIAM B. EDWARDS and ROBERT L. CUL-
PEPPER et als.,

Defendants.

Writ of Error.

United States of America,—ss.

The President of the United States of America to
the Honorable the Judge of the District Court of
the United States for the Southern District of
California, Southern Division, Greeting:

*Page-number appearing at foot of page of original certified Record.

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, between William B. Edwards and Robert L. Culpepper, plaintiffs in error, and the United States of America, defendant in error, a manifest error hath happened to the great damage of the said William B. Edwards and Robert L. Culpepper, plaintiffs in error, as by their complaint appears:

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same in the said Circuit Court of Appeals at the city of San Francisco, in the state of [4] California, within thirty days from the date hereof, that the record and proceedings aforesaid, being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the United States, the

18th day of May, in the year of Our Lord, 1914.

[Seal]

WM. M. VAN DYKE,

Clerk of the United States District Court, Southern
District of California, Southern Division.

By Chas. N. Williams,

Deputy Clerk.

Allowed by:

OLIN WELLBORN,

District Judge.

I hereby certify that a copy of the within writ of error was on the 19th day of May, 1914, lodged in the clerk's office of the United States District Court for the Southern District of California, Southern Division, for the said defendants in error.

Clerk U. S. District Court, Southern District of
California, Southern Division.

By Chas. N. Williams. [5]

[Endorsed]: No. 655—Crim. United States District Court, Southern District of California, Southern Division. The United States of America, Plaintiffs, vs. William B. Edwards et al., Defendants. Writ of Error. Filed May 19, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [6]

Citation on Writ of Error.

UNITED STATES OF AMERICA—ss.

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San

Francisco, in the State of California, within thirty days from date hereof, pursuant to a Writ of Error filed in the clerk's office of the United States District Court for the Southern District of California, Southern Division, wherein William B. Edwards and Robert L. Culpepper are Plaintiffs in Error, and you are Defendants in Error, to show cause, if any there be, why the Judgment entered against the said Plaintiffs in Error, and each of them, as in the said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable OLIN WELLBORN, Judge of the United States District Court for the Southern District of California, this 19th day of May, in the year of our Lord one thousand nine hundred and fourteen.

OLIN WELLBORN,
United States District Judge, for the Southern District of California.

Service of the within Citation is hereby admitted, and a Copy thereof accepted, this 19th day of May, 1914.

ALBERT SCHOONOVER,
Attorneys for Plaintiffs and Defendants in Error.
[7]

[Endorsed]: No. 655—Crim. U. S. District Court, Southern District of California, Southern Division. The United States of America, Plaintiffs, vs. William B. Edwards et al., Defendants. Citation on Writ of Error. Filed May 19, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk.
[8]

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

No. 655—CRIM.

THE UNITED STATES OF AMERICA,
Plaintiffs,

vs.

WILLIAM B. EDWARDS, ROBERT L. CUL-
PEPPER et al.,

Defendants. [9]

Indictment.

*In the District Court of the United States, in and
for the Southern District of California, South-
ern Division:*

At a stated term of said Court, begun and holden
at the City of Los Angeles, County of Los Angeles,
within and for the Southern Division of the South-
ern District of California, on the second Monday of
January, in the year of our Lord one thousand nine
hundred and thirteen,

The Grand Jurors of the United States of
America, chosen, selected and sworn, within and for
the Division and District aforesaid, on their oath
present:

That William B. Edwards, Robert L. Culpepper,
John McLaren, Lee Wells, William Wells, and Arch
Robison, whose full and true names are, and the full
and true name of each of whom is, other than as
herein stated, to the Grand Jurors unknown, late of
the Southern Division of the Southern District of

California, heretofore, to wit, on or about the 1st day of June, in the year of our Lord one thousand nine hundred and twelve, in the County of Riverside, in the State and Southern Division of the Southern District of California, and within the jurisdiction of this Honorable Court, did, wilfully, knowingly, unlawfully, wickedly, corruptly, and feloniously, conspire, combine, confederate and agree together, and with divers other persons, whose names are to the Grand Jurors unknown, to injure, oppress, threaten and intimidate a certain citizen of the United States, [10] to wit, one James M. Ocheltree, in the free exercise and enjoyment of a right and privilege secured to him by the Constitution and laws of the United States, that is to say, that theretofore, to wit, on the 18th day of May, 1910, and at all times thereafter in this indictment mentioned, the said James M. Ocheltree was a citizen of the United States and in all respects qualified to take and enter and hold public lands of the United States under the public land laws of the United States, and especially to make and perfect the homestead entry hereinafter mentioned; that on the 18th day of May, 1910, the said James M. Ocheltree, desiring to avail himself of the benefits of the public land laws of the United States, and especially of the laws of the United States relating to homesteads, did, under and by virtue of said public land laws of the United States, and more particularly under and by virtue of the provisions of Section 2289 et seq. of the Revised Statutes of the United States, and the other laws of the United States relating to homesteads, make and file at and in the

United States Land Office in the City of Los Angeles, State of California, his application and declaration under oath, to enter as a homestead under said public land laws of the United States relating to homesteads, the following described tract of land, situated in the County of Riverside, State of California, and within the Los Angeles land district, to wit, the Southwest quarter of Section 12, Township 7 South, Range 22 East, San Bernardino Base and Meridian; and thereafter, to wit, on the 1st day of [11] June, 1912, the said declaration under oath and application to enter the said tract of land as a homestead was duly and regularly allowed by the Register and Receiver of the said United States Land Office at Los Angeles, and on said 1st day of June, 1912, the said James M. Ocheltree, was allowed to, and did enter as a homestead under said public land laws of the United States relating to homesteads, the said above-described tract of land; and ever since said 1st day of June, 1912, the said James M. Ocheltree has been, and is now the owner of, and entitled to the exercise and possession of all rights flowing from the said homestead application and entry, including the right to make settlement and residence upon said tract of land above described, and to live and reside upon the same, and to cultivate and improve the same in the manner required by said public land laws of the United States relating to homesteads; and heretofore, to wit, on the 6th day of November, 1912, the said James M. Ocheltree, being desirous of complying with said public land laws of the United States relating to homesteads, attempted to make settlement and residence

upon said land above described, and for that purpose, he, in company with his wife and family, went in and on to said land with the necessary materials, tools, household furniture and utensils to construct a house upon said land, and to make settlement and residence upon said land for the purpose aforesaid; that the said William B. Edwards, Robert L. Culpepper, John McLaren, Lee Wells, William Wells, and Arch Robison, heretofore, to wit, on or [12] about the 1st day of June, 1912, well knowing of the making of said homestead entry on said above-described land and premises by the said James M. Ocheltree, and well knowing the said James M. Ocheltree's intention to make settlement and residence upon and to enter into the possession of, and cultivate and improve said land and premises, under and by virtue of, and as required by said public land laws of the United States relating to homesteads, as aforesaid, at and within the County of Riverside, and within the Southern Division of the Southern District of California, did wilfully, knowingly, unlawfully and feloniously, conspire, combine, confederate and agree together, and with divers other persons, whose names are, as aforesaid, to the Grand Jurors unknown, to injure, oppress, threaten and intimidate the said James M. Ocheltree, in the free exercise and enjoyment of the right and privilege secured to him by the Constitution and laws of the United States, to make effectual his said homestead entry, by entering into the possession of, making settlement upon, and residing upon, cultivating, and improving the said land embraced in the said homestead entry, and in other respects com-

plying with the public land laws of the United States relating to homesteads, and thereby earning and procuring title and patent to said land; that the said conspiracy was to be carried out and the object thereof effected by them, the said William B. Edwards, Robert L. Culpepper, John McLaren, Lee Wells, William Wells and Arch Robison, and said [13] other persons, whose names are, as aforesaid, to the Grand Jurors unknown, by going upon said land in force and numbers and making threats of violence to the said James M. Ocheltree and his family against the persons and property of the said James M. Ocheltree and his family, and by publishing such threats in the community where the said land is situated, and where the said James M. Ocheltree and his family lived; and by forcibly obstructing the efforts of the said James M. Ocheltree to settle upon said land, take his household effects thereon, build a dwelling-house upon and cultivate said land; and by appearing in strength and numbers upon said land, and by and with the use of force and violence against the said James M. Ocheltree and his family, ejecting and removing them and their goods and effects from said land and premises, and preventing them from settling and residing upon and cultivating said land; that the above-described land and premises, and the whole thereof, were at the time of the making and filing of said declaration and application for homestead by the said James M. Ocheltree, and at the time when the said homestead entry was allowed as aforesaid, unappropriated public lands of the United States open to entry under said public

land laws of the United States relating to homesteads; and the intent and object of the said William B. Edwards, Robert L. Culpepper, John McLaren, Lee Wells, William Wells and Arch Robison, and the said other persons, whose names are, as aforesaid, to the Grand Jurors unknown, being to so injure, oppress, threaten and intimidate the said James M. [14] Ocheltree in the free exercise and enjoyment of the said right secured by the Constitution and laws of the United States, as aforesaid, as to cause and compel him, the said James M. Ocheltree, against his will and desire, to cease the exercise and enjoyment of said land and homestead entry and all of his rights thereunder.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present:

That in pursuance of said conspiracy, and to effect and accomplish the object thereof, the said Robert L. Culpepper, on the 6th day of November, 1912, at and within the County of Riverside, State of California, did, wilfully appear upon the aforesaid land, accompanied by the said William B. Edwards and John McLaren, and did threaten and state to the said James M. Ocheltree that if he, the said James M. Ocheltree, should attempt to unload certain materials, tools, household furniture, utensils and other property which he, the said James M. Ocheltree, had on said day, brought loaded upon a wagon to said land, and if he, the said James M. Ocheltree, did not remove said materials, tools, household furniture, utensils, and other property from said land and depart hence with the same, that he, the said Robert L.

Culpepper, would burn and destroy the said materials, tools, household furniture, utensils and other property of the said James M. Ocheltree.

And the Grand Jurors aforesaid, on their oath, aforesaid, do further present: [15]

That in further pursuance of said conspiracy, and to effect and accomplish the object thereof, the said William B. Edwards and Robert L. Culpepper, on the 6th day of November, 1912, at and within the County of Riverside, State of California, and upon said land, did, wilfully and forcibly take possession of and remove from said land and premises, some of the household furniture of the said James M. Ocheltree, which he, the said James M. Ocheltree, had then and there brought upon said land, and with which he intended and was endeavoring to make settlement and residence thereon.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present:

That in further pursuance of said conspiracy, and to effect and accomplish the object thereof, the said Robert L. Culpepper, on the 6th day of November, 1912, at and within the County of Riverside, State of California, did wilfully strike and beat a horse which was harnessed to a wagon upon which was loaded certain household goods and effects of the said James M. Ocheltree, which he, the said James M. Ocheltree, had then and there brought upon the said above-described land for the purpose of making settlement thereon, and the said Robert L. Culpepper so struck said horse for the purpose of causing it to run from said land, and haul said household furniture and ef-

fects away therefrom.

Contrary to the form of the Statutes of the United States in such case made and provided, and against the peace and dignity of the said United States.

[16]

SECOND COUNT.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present:

That William B. Edwards, Robert L. Culpepper, John McLaren, Lee Wells, William Wells and Arch Robison, whose full and true names are, and the full and true name of each of whom is, other than as herein stated, to the Grand Jurors unknown, late of the Southern Division of the Southern District of California, heretofore, to wit, on or about the 1st day of June, in the year of our Lord one thousand nine hundred and twelve, in the County of Riverside, in the State and Southern Division of the Southern District of California, and within the jurisdiction of this Honorable Court, did, wilfully, knowingly, unlawfully, wickedly, corruptly and feloniously, conspire, combine, confederate and agree together, and with divers other persons, whose names are to the Grand Jurors unknown, to injure, oppress, threaten, and intimidate a certain citizen of the United States, to wit, one Patrick H. Bodkin, in the free exercise and enjoyment of a right and privilege secured to him by the Constitution and laws of the United States, that is to say, that theretofore, to wit, on the 18th day of May, 1910, and at all times thereafter in this indictment mentioned, the said Patrick H. Bodkin, was a citizen of the United States and in all respects quali-

fied to take and enter and hold public lands of the United States under the public land laws of the United States, and especially to make and perfect the [17] homestead entry hereinafter mentioned; that on the 18th day of May, 1910, the said Patrick H. Bodkin, desiring to avail himself of the benefits of the public land laws of the United States, and especially of the laws of the United States relating to homesteads, did, under and by virtue of said public land laws of the United States, and more particularly under and by virtue of the provisions of Sections 2289 et seq. of the Revised Statutes of the United States, and the other laws of the United States relating to homesteads, make and file at and in the United States Land Office in the City of Los Angeles, State of California, his application and declaration under oath, to enter as a homestead under said public land laws of the United States relating to homesteads, the following described tract of land, situated in the County of Riverside, State of California, and within the Los Angeles land district, to wit, the Northeast quarter of Section 11, Township 7 South, Range 22 East, San Bernardino Base and Meridian; and thereafter, to wit, on the 1st day of June, 1912, the said declaration under oath and application to enter the said tract of land as a homestead was duly and regularly allowed by the Register and Receiver of the said United States Land Office at Los Angeles, and on said 1st day of June, 1912, the said Patrick H. Bodkin, was allowed to, and did enter as a homestead under said public land laws of the United States relating to homesteads, the said above-described tract

of land; that the above-described land and premises, and the whole thereof, were at the time of the making and filing of said declaration and application [18] for homestead by the said Patrick H. Bodkin, and at the time when the said homestead entry was allowed, as aforesaid, unappropriated public lands of the United States open to entry under said public land laws of the United States relating to homesteads; and ever since said 1st day of June, 1912, the said Patrick H. Bodkin has been, and is now the owner of, and entitled to the exercise and possession of all rights flowing from the said homestead application and entry, including the right to make settlement and residence upon said tract of land above described and to live and reside upon the same, and to cultivate and improve the same in the manner required by said public land laws of the United States relating to homesteads; and heretofore, to wit, on the 25th day of November, 1912, the said Patrick H. Bodkin, being desirous of complying with said public land laws of the United States relating to homesteads, attempted to make settlement and residence upon said land above described, and for that purpose he, in company with his wife and family, went in and on to said land with the necessary materials, tools, household furniture and utensils to construct a house upon said land, and to make settlement and residence upon said land for the purpose aforesaid; that the said William B. Edwards, Robert L. Culpepper, John McLaren, Lee Wells, William Wells and Arch Robison, heretofore, to wit, on or about the 1st day of June, 1912, well knowing of the making of said

homestead entry on said above-described land and premises by the said Patrick H. Bodkin, and [19] well knowing the said Patrick H. Bodkin's intention to make settlement and residence upon and to enter into the possession of, and cultivate and improve said land and premises, under and by virtue of, and as required by said public land laws of the United States relating to homesteads, as aforesaid, at and within the County of Riverside, and within the Southern Division of the Southern District of California, did wilfully, knowingly, unlawfully, and feloniously, conspire, combine, confederate and agree together, and with divers other persons, whose names are, as aforesaid, to the Grand Jurors unknown, to injure, oppress, threaten and intimidate the said Patrick H. Bodkin, in the free exercise and enjoyment of the right and privilege secured to him by the Constitution and laws of the United States, to make effectual his said homestead entry, by entering into the possession of, making settlement upon, and residing upon, cultivating, and improving the said land embraced in the said homestead entry, and in other respects complying with the public land laws of the United States relating to homesteads, and thereby earning and procuring title and patent to said land; that the said conspiracy was to be carried out and the object thereof effected by them, the said William B. Edwards, Robert L. Culpepper, John McLaren, Lee Wells, William Wells and Arch Robison, and said other persons, whose names are, as aforesaid, to the Grand Jurors unknown, by going upon said land in force and numbers and making threats of violence to

the said Patrick H. Bodkin and his family against the persons and property of the said Patrick H. Bodkin and his family, and by publishing such threats [20] in the community where the said land is situated, and where the said Patrick H. Bodkin and his family lived; and by forcibly obstructing the efforts of the said Patrick H. Bodkin to settle upon said land, take his household effects thereon, build a dwelling-house upon and cultivate said land; and by appearing in strength and numbers upon said land, and by and with the use of force and violence against the said Patrick H. Bodkin and his family, ejecting and removing them and their goods and effects from said land and premises, and preventing them from settling and residing upon and cultivating said land; and the intent and object of the said William B. Edwards, Robert L. Culpepper, John McLaren, Lee Wells, William Wells and Arch Robison, and the said other persons, whose names are, as aforesaid, to the Grand Jurors unknown, being to so injure, oppress, threaten and intimidate the said Patrick H. Bodkin in the free exercise and enjoyment of the said right secured by the Constitution and laws of the United States, as aforesaid, as to cause and compel him, the said Patrick H. Bodkin, against his will and desire, to cease the exercise and enjoyment of said rights and privileges and to be deprived of said land and homestead entry and all of his rights thereunder.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present:

That in pursuance of said conspiracy, and to effect

and accomplish the object thereof, the said William B. Edwards, on the 25th day of November, 1912, at and within the County of Riverside, State of California, did, wilfully, appear upon the aforesaid land, accompanied [21] by a constable named Ross Wells, and did say to the said Patrick H. Bodkin, who had then and there come upon said land with certain materials, tools, household furniture, utensils and other property, loaded upon a wagon, "What the devil are all these people doing here?" and thereupon the said William B. Edwards ordered and caused said constable, Ross Wells, to arrest, and he did arrest, the wife and son of Patrick H. Bodkin.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present:

That in further pursuance of said conspiracy, and to effect and accomplish the object thereof, certain persons, whose names are to the Grand Jurors unknown, but of the number of those mentioned above as conspirators, on the 25th day of November, 1912, at and within the County of Riverside, State of California, did wilfully break, knock down and demolish a tent house which the said Patrick H. Bodkin had erected upon the said above-described land for the purpose of making settlement thereon.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present:

That in further pursuance of said conspiracy, and to effect and accomplish the object thereof, the said William B. Edwards, on or about the 17th day of December, 1912, at and within the County of Riverside, State of California, and upon said land, did will-

fully deliver to the said Patrick H. Bodkin, a certain threatening notice in writing, which notice was in words and figures as follows: [22]

“Neighbours, California, Dec. 17th, 1912.
To the *Rev.* Patrick H. Bodkin and others.

You are hereby notified that I have possession and am entitled to the possession of these premesises (N. E. Qr. of Sec. 11, T. 7 S., R. 22 E., S. B. M.), and any attempt by you or others to assume possession of these premises without due process of law is an offence both againt the civil and criminal laws of the State, and you are hereby formally and finally notified and ordered to depart and decamp and refrain from further contaminating the vicinity with your putrescent presence.

W. B. EDWARDS.”

Contrary to the form of the Statutes of the United States in such case made and provided, and against the peace and dignity of the said United States.

A. I. McCORMICK,

United States Attorney.

DUDLEY W. ROBINSON,

Asst. United States Attorney. [23]

[Indorsed]: “No. 655—Crim. United States District Court, Southern District of California, Southern Division. The United States of America vs. William B. Edwards, Robert L. Culpepper, John McLaren, Lee Wells, William Wells, and Arch Robinson. Indictment for Violation Section 19, Federal Penal Code of 1910. Conspiracy to injure, oppress, etc. citizens in the exercise of civil rights. A true

bill. S. D. Barkley, Foreman. Presented and filed in open court, this 11th day of July, A. D. 1913. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. —————, United States Attorney.” [24]

[Minutes of Court—July 29, 1913—Pleas.]

At a stated term, to wit, the July term, A. D. 1913, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Tuesday, the twenty-ninth day of July, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable OLIN WELLBORN, District Judge.

No. 655—CRIM. S. D.

THE UNITED STATES OF AMERICA,
Plaintiffs,
vs.
WILLIAM B. EDWARDS et al.,
Defendants.

This cause coming on this day by consent for the further arraignment of all defendants except defendant Lee Wells, and the entry of their pleas; Dudley W. Robinson, Esq., Assistant U. S. Attorney, appearing as counsel for the United States; defendants William B. Edwards, Robert L. Culpepper, John McLaren, William Wells and Arch Robison being present on bail, with their counsel, Robert L. Hanley, Esq.; and said five defendants having been called

and further arraigned, having waived the reading of the indictment, and, on being required to plead thereto, said five defendants now present having pleaded not guilty as charged in the indictment, which pleas are by order of the court hereby entered herein; it is ordered that said cause be, and the same hereby is continued to be hereafter set down for the trial of defendants William B. Edwards, Robert L. Culpepper, John McLaren, William Wells and Arch Robison. [25]

[Minutes of Trial—April 2, 1914.]

At a stated term, to wit, the January Term, A. D. 1914, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Thursday, the second day of April, in the year of our Lord, one thousand nine hundred and fourteen. Present: The Honorable OLIN WELLBORN, District Judge.

No. 655—CRIM. S. D.

THE UNITED STATES OF AMERICA,
Plaintiffs,

vs.

WILLIAM B. EDWARDS et al.,
Defendants.

This cause coming on this day for the trial, before the court and a jury to be impanelled, of defendants, William B. Edwards, Robert L. Culpepper, John

McLaren, William Wells and Arch Robison, who are each and all present on bail; and defendant Lee Wells being also present on bail, and having remained present during the impanellment of the jury herein and until this cause was continued for further trial until 2 o'clock, P. M. of this day; Duke Stone, Esq., and Robert O'Connor, Esq., Assistant U. S. Attorneys, appearing as counsel for the United States; J. O. Phillips, Esq., and Henry O. Willis, Esq., appearing as counsel for defendants; John P. Doyle being present as shorthand reporter of the testimony and proceedings, and acting as such; and the court having ordered that the trial proceed, and that a jury be impanelled herein; and the following twelve (12) term trial jurors having been duly drawn, called, and sworn on *voir dire*, to wit: Arthur W. Ballard, George H. Cooper, Frank H. Smith, G. L. Davidson, Frank L. A. Violet, Geo. [26] E. Triggs, J. F. Anderson, Albert S. Stimson, Frank S. Munson, Daniel Mulhern, John S. Winchester and I. H. Polk; and a statement of the nature of the case having been made by Duke Stone, Esq., Assistant U. S. Attorney, of counsel for the United States; and said jurors having been examined by Duke Stone, Esq., Assistant U. S. Attorney, of counsel for the United States, and by Henry O. Willis, Esq., of counsel for defendants; and John S. Winchester having been excused for cause, pursuant to the stipulation of counsel for the respective parties; and J. J. McQuaid, a term trial juror, having been duly drawn, called, sworn on *voir dire* and examined by counsel for the Government and by counsel for defendants; and the twelve jurors

now in the box having been passed for cause by counsel for both sides; and George H. Cooper having been challenged peremptorily by defendants and excused; and S. S. Boothe, a term trial juror, having been duly drawn, called, sworn on *voir dire*, examined by counsel for the Government and by counsel for defendants and passed for cause; and the twelve (12) jurors now in the box having been accepted by counsel for the Government and by counsel for defendants and duly sworn in a body as the jury to try this cause, said jury as so impanelled and sworn consisting of the following named jurors, to wit:

JURY:

- | | |
|------------------------|-----------------------|
| 1. Arthur W. Ballard, | 7. J. F. Anderson, |
| 2. S. S. Boothe, | 8. Albert S. Stimson, |
| 3. Frank H. Smith, | 9. Frank S. Munson, |
| 4. G. L. Davidson, | 10. Daniel Mulhern, |
| 5. Frank L. A. Violet, | 11. J. J. McQuaid, |
| 6. Geo. E. Triggs, | 12. I. H. Polk. |

and the indictment having been read to the jury and the pleas of not guilty of said five defendants on trial having been stated to the jury by the clerk; and Duke Stone, Esq., Assistant U. S. Attorney, of counsel for the United States, having made a statement [27] to the jury of what the Government expects to prove; and the Court having admonished the jury, that, during the progress of this trial, they are not to permit other persons to talk to them, nor themselves talk to other persons, about this case or anything connected with this case, and that, until said case is finally given them for consideration, under the in-

structions of the Court, they are not to talk with each other about this case or anything connected with it; it is, at the hour of 11:40 o'clock A. M., ordered that this cause be, and the same hereby is continued for further trial until the hour of 2 o'clock, P. M., of this day, until which time the jurors are excused.

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No. 655—CRIM. S. D.

THE UNITED STATES OF AMERICA,
Plaintiffs,
vs.
WILLIAM B. EDWARDS et al.,
Defendants.

This cause coming on now, at the hour of 2 o'clock, P. M., of this day, for the further trial, before the Court and a jury heretofore duly impanelled herein, of defendants William B. Edwards, Robert L. Culpepper, John McLaren, William Wells and Arch Robison, who are each and all present on bail, and defendant Lee Wells being also present on bail; Duke Stone, Esq., and Robert O'Connor, Esq., Assistant U. S. Attorneys, appearing as counsel for the United States; J. O. Phillips, Esq., and Henry O. Willis, Esq., appearing as counsel for defendants; John P. Doyle having been sworn as shorthand reporter of the testimony and proceedings, and acting as such; and the roll of the jury having been called, and all being present; and now, by consent, defendant Lee Wells having been called and arraigned, having stated that his true name is Lee Wells, and the indictment having been read at the morning session in the pres-

ence of said defendant, [28] Lee Wells, and, on being required to plead thereto, said defendant Lee Wells having pleaded not guilty as charged therein, which plea is now by order of the Court entered herein; and Duke Stone, Esq., Assistant U. S. Attorney, of counsel for the Government, and Henry O. Willis, Esq., of counsel for defendants, having stipulated, and the Court having ordered, pursuant to said stipulation, that the trial of this cause before the jury now impanelled herein shall proceed as against all defendants, including said defendant Lee Wells, with the same force and effect as if said plea of defendant Lee Wells had been entered at the time of the entry of the pleas of the other five defendants in this cause; and Frank Buren having been called and sworn as a witness for the United States, and having been given his testimony; it is, at the hour of 3:02 o'clock P. M., by the Court ordered that this cause be, and the same hereby is passed temporarily for further trial, to enable the Court to receive a verdict in another cause and make the orders connected therewith and occasioned thereby.

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No. 655—CRIM. S. D.

THE UNITED STATES OF AMERICA,
 Plaintiffs,
 vs.
 WILLIAM B. EDWARDS et al.,
 Defendants.

This cause having been now, at the hour of 3:09 o'clock, P. M., called for further trial before the

Court and a jury heretofore duly impanelled herein; Duke Stone, Esq., and Robert O'Connor, Esq., Assistant U. S. Attorneys, appearing as counsel for the United States; each and all of the defendants herein being present on bail, with their counsel, J. O. Phillips, Esq., and Henry O. Willis, Esq.; John P. Doyle being present as shorthand reporter of the testimony and proceedings, and acting as such; and the roll of the jury having been called, and all being present; and Frank Buren, a witness on behalf of the United [29] States, being on the stand for further examination, and having given his testimony; and Court, at the hour of 3:30 o'clock P. M., having taken a recess for 8 minutes; and now, at the hour of 3:38 o'clock, P. M., Court having reconvened; and defendants, counsel and shorthand reporter being present as before; and the roll of the jury having been called, and all being present; and Frank Buren, a witness on behalf of the United States, being on the stand for further examination, and having given his testimony; and Patrick H. Bodkin having been called and sworn as a witness on behalf of the United States, and having given his testimony; and the Court having given the jury the usual admonition; it is, at the hour of 4:32 o'clock, P. M., ordered that this cause be, and the same hereby is continued for further trial until Friday, the 3d day of April, 1914, at 10:30 o'clock, A. M., until which time the jurors are excused. [30]

At a stated term, to wit, the January term, A. D. 1914, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Friday, the third day of April, in the year of our Lord, one thousand nine hundred and fourteen. Present: The Honorable OLIN WELLBORN, District Judge.

[Minutes of Trial—April 3, 1914.]

No. 655—CRIM. S. D.

THE UNITED STATES OF AMERICA,
Plaintiffs,

vs.

WILLIAM B. EDWARDS et al.,
Defendants.

This cause coming on this day to be further tried before the Court and a jury heretofore duly impanelled herein; Duke Stone, Esq., and Robert O'Connor, Esq., Assistant U. S. Attorneys, appearing as counsel for the United States; defendants being each and all present on bail, with their counsel, J. O. Phillips, Esq., and Henry O. Willis, Esq., John P. Doyle, and N. H. Peterson being present as shorthand reporters of the testimony and proceedings, and acting as such; and the roll of the jury having been called, and all being present; and Patrick H. Bodkin, a witness on behalf of the United States, having resumed the stand for further examination, and having given his testimony; and, in connection with the testimony of said

witness, the Government having offered the following exhibits, which are admitted in evidence in its behalf, to wit: U. S. Ex. 1, Photograph; U. S. Ex. 2, Letter of Dec. 17th, 1912; U. S. Ex. 3, Letter to the Rev Patrick Henry Bodkin; U. S. Ex. 4, Notice of W. B. Edwards, Contestee; and U. S. Ex. 5, Printed Notice; and, also in connection with said testimony, defendants having offered an exhibit, which is offered in evidence in their behalf [31] as Defts. Ex. "A," Information of Threatened Offence; and Court having at the hour of 12:03 o'clock P. M., taken a recess until the hour of 2 o'clock P. M., of this day;

And now, at the hour of 2 o'clock P. M., Court having reconvened; and defendants, counsel and the shorthand reporter being present as before; and the roll of the jury having been called, and all being present; and Patrick H. Bodkin, a witness on behalf of the United States, having resumed the stand for further examination, and having given his testimony; and, in connection with the testimony of said witness, the defendants having offered two exhibits, which are admitted in evidence in their behalf, to wit: Defts. Exhibit "B," Decision of Justice of the Peace; and Defts. Exhibit "C," Copy of Judgment of Superior Court; and, also in connection with said testimony, the Government having offered a letter to L. G. Fleischer, and envelope of same, which are together admitted in evidence as U. S. Ex. 6; and Mrs. Patrick H. Bodkin having been called and sworn as a witness on behalf of the United States, and having given her testimony; and Court, at the hour of 3:32 o'clock P. M., having taken a recess for 15 minutes;

and now, at the hour of 3:47 o'clock P. M., Court having reconvened; and defendants and counsel being present as before; and N. H. Peterson having been sworn as shorthand reporter of the testimony and proceedings, and acting as such; and the roll of the jury having been called, and all being present; and Mrs. Patrick H. Bodkin, a witness on behalf of the United States, being on the stand for further examination, and having given her testimony; and Court, at the hour of 3:52 o'clock P. M., having taken a recess for 5 minutes; and now, at the hour of 3:57 o'clock P. M., Court having reconvened; and defendants, counsel and the shorthand reporter being present as before; and the roll of the jury having been called, and all being present; and Mrs. Patrick H. Bodkin, a witness on behalf of the United States, being on the stand for further examination, [32] and having given her testimony; it is, at the hour of 4:05 o'clock P. M., ordered that this cause be, and the same hereby is continued until Tuesday, the 7th day of April, 1914, at 10:30 o'clock A. M., for further trial, until which time the jurors are excused. [33]

At a stated term, to wit, the January Term, A. D. 1914, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the City of Los Angeles, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable OLIN WELLBORN, District Judge.

[**Minutes of Trial—April 7, 1914.**]

No. 655—CRIM. S. D.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

WILLIAM B. EDWARDS et al.,

Defendants.

This cause coming on this day to be further tried before the court and a jury heretofore duly impanelled herein; Duke Stone, Esq., Assistant U. S. Attorney, appearing as counsel for the United States; defendants being present on bail, with their counsel, Henry O. Willis, Esq., and J. O. Phillips, Esq.; John P. Doyle and N. H. Peterson being present as shorthand reporters of the testimony and proceedings, and acting as such; and the roll of the jury having been called, in connection with the call of the roll of the entire panel of term trial jurors, and all being present; and Mrs. Patrick H. Bodkin, a witness on behalf of the United States, having resumed the stand for further examination, and having given her testimony; and Jesse I. Bodkin and L. G. Fleischer having respectively been called and sworn as witnesses on behalf of the United States, and having given their testimony; it is, at the hour of 12 o'clock M., ordered that this cause be, and the same hereby is continued until the hour of 2 o'clock P. M. of this day for further trial, until which time the jurors are excused.

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No. 655—CRIM. S. D.

THE UNITED STATES OF AMERICA,
Plaintiffs,

vs.

WILLIAM B. EDWARDS et al.,
Defendants.

This cause coming on at this time to be further tried before the court and a jury heretofore duly impanelled herein; Duke Stone, Esq., Assistant U. S. Attorney, appearing as counsel for the United States; defendants being present on bail, with their counsel, Henry O. Willis, Esq., and J. O. Phillips, Esq.; John P. Doyle and N. H. Peterson being present as shorthand reporters of the testimony and proceedings, and acting as such; and the roll of the jury having been called, and being present; and F. G. Fleischer, a witness on behalf of the United States, having resumed the stand for further examination, and having given his testimony; and, in connection with the testimony of said witness, the defendants having offered two exhibits, which are admitted in evidence in their behalf, to wit: Defts. Exhibit "D," Notice, signed by John McLaren; and Defts. Exhibit "E," copy of Summons and Complaint; and court, at the hour of 3:35 o'clock P. M., having taken a recess for 10 minutes; and now, at the hour of 3:45 o'clock P. M., court having reconvened; and defendants, and counsel being present as before; John P. Doyle being present as shorthand reporter of the testimony and proceedings, and acting as such; and the roll of the jury having been called, and all being pres-

ent; and F. G. Fleischer, a witness on behalf of the United States, being on the stand for further examination, and having given his testimony; and the Government, in connection with the testimony of said witness, having offered a copy of summons and complaint, which are together admitted in evidence in its behalf as U. S. Ex. 7; and J. M. Ocheltree having [35] been called and sworn as a witness on behalf of the United States, and having given his testimony; it is, at the hour of 4:15 o'clock P. M., ordered that this cause be, and the same hereby is continued for further trial until Wednesday, the 8th day of April, 1914, at 10:30 o'clock A. M., until which time the jurors are excused. [36]

At a stated term, to wit, the January Term, A. D. 1914, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the City of Los Angeles, on Wednesday, the eighth day of April, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable OLIN WELLBORN, District Judge.

[Minutes of Trial—April 8, 1914.]

No. 655—CRIM. S. D.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

WILLIAM B. EDWARDS et al.,

Defendants.

This cause coming on this day to be further tried before the court and a jury heretofore duly impanelled herein; Duke Stone, Esq., and Robert O'Connor, Esq., Assistant U. S. Attorneys, appearing as counsel for the United States; defendants being present on bail, with their counsel, Henry O. Willis, Esq., and J. O. Phillips, Esq.; John P. Doyle and N. H. Peterson being present as shorthand reporters of the testimony and proceedings, and acting as such; and the roll of the jury having been called, and all being present; and J. M. Ocheltree, a witness on behalf of the United States, having resumed the stand for further examination, and having given his testimony; and, in connection with the testimony of said witness, the Government having offered three exhibits, which are admitted in evidence in its behalf, to wit: U. S. Ex. 8, Letter of June 20, 1912, from R. L. Culpepper; U. S. Ex. 9, Letter of 7/6, 1912, from R. L. Culpepper; and U. S. Ex. 10, copy of complaint, summons, notice, notice of trial and judgment; and court, at the hour of 11:38 o'clock A. M., having taken a recess for 10 minutes; and now, at the hour of 11:48 o'clock A. M., court having [37] reconvened; and defendants and counsel being present as before; John P. Doyle being present as shorthand reporter of the testimony and proceedings, and acting as such; and the roll of the jury having been called, and all being present; and J. M. Ocheltree, a witness on behalf of the United States, being on the stand for further examination, and having given his testimony; it is, at the hour of 12:33 o'clock P. M., ordered that this cause

be, and the same hereby is continued until the hour of 2:30 o'clock P. M., of this day for further trial, until which time the jurors are excused.

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No. 655—CRIM. S. D.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

WILLIAM B. EDWARDS et al.,

Defendants.

This cause coming on at this time to be further tried before the court and a jury heretofore duly impanelled herein; Duke Stone, Esq., and Robert O'Connor, Esq., Assistant U. S. Attorneys, appearing as counsel for the United States; defendants being present on bail, with their counsel, Henry O. Willis, Esq., and J. O. Phillips, Esq.; N. H. Peterson being present as shorthand reporter of the testimony and proceedings, and acting as such; and the roll of the jury having been called, and all being present; and J. M. Ocheltree, a witness on behalf of the United States, having resumed the stand for further examination, and having given his testimony; and, in connection with the testimony of said witness, the defendants having offered three exhibits, which are admitted in evidence in their behalf, to wit: Defts. Ex. "F," notice; Defts. Ex. "G," letter of July 2, 1912, to W. L. Culpepper, and envelope; and Defts. Ex. "H," letter of October 23, 1912; and Mrs. J. M. Ocheltree, Mansel Ocheltree [38] and Paul Ocheltree having respectively been called and

sworn as witnesses on behalf of the United States, and having given their testimony; and F. F. Nelson having been called and affirmed as a witness on behalf of the United States, and having given his testimony; it is, at the hour of 4:28 o'clock P. M., ordered that this cause be, and the same hereby is continued for further trial until Thursday, the 9th day of April, 1914, at 10:30 o'clock A. M., until which time the jurors are excused. [39]

At a stated term, to wit, the January Term, A. D. 1914, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the City of Los Angeles, on Thursday, the ninth day of April, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable OLIN WELLBORN, District Judge.

[Minutes of Trial—April 9, 1914.]

No. 655—CRIM. S. D.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

WILLIAM B. EDWARDS et al.,

Defendants.

This cause coming on this day to be further tried before the court and a jury heretofore duly impanelled herein; Duke Stone, Esq., and Robert O'Connor, Esq., Assistant U. S. Attorneys, appearing as counsel for the United States; defendants being

present in court on bail, with the exception of defendant William B. Edwards, who is not present; Henry O. Willis, Esq., and J. O. Phillips, Esq., appearing as counsel for defendants; and John P. Doyle being present as shorthand reporter of the testimony and proceedings, and acting as such; and the roll of the jury having been called, and all being present; and no testimony being taken or proceedings had in this cause at this time on account of the absence of one defendant; and court, at the hour of 10:45 o'clock A. M., having taken a recess for 5 minutes; and now, at the hour of 10:50 o'clock A. M., court having reconvened; and counsel and the shorthand reporter being present as before; and all the defendants now being present on bail; and the roll of the jury having been called, and all being present; and F. F. Nelson, a witness on behalf of the United States, having resumed the stand for further examination, and [40] having given his testimony; and, in connection with the testimony of said witness, the Government having offered a Notice, which is admitted in evidence as U. S. Ex. 11; and L. C. G. Harris, D. C. Willman, and F. M. Stewart having respectively been called and sworn as witnesses on behalf of the United States, and having given their testimony; and Patrick H. Bodkin, a witness on behalf of the United States, having been recalled for further examination, and having given his testimony; it is, at the hour of 12 o'clock M., ordered that this cause be, and the same hereby is continued for further trial until the hour of 2 o'clock P. M., of this day, until

which time the jurors are excused.

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No. 655—CRIM. S. D.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

WILLIAM B. EDWARDS et al.,

Defendants.

This cause coming on at this time to be further tried before the court and a jury heretofore duly impanelled herein; Duke Stone, Esq., and Robert O'Connor, Esq., Assistant U. S. Attorneys, appearing as counsel for the United States; defendants being present on bail, with their counsel, Henry O. Willis, Esq., and J. O. Phillips, Esq.; John P. Doyle, being present as shorthand reporter of the testimony and proceedings, and acting as such; and the roll of the jury having been called, and all being present; and Patrick H. Bodkin, a witness on behalf of the United States, having resumed the stand for further examination, and having given his testimony; and, in connection with the testimony of said witness, defendants having offered three exhibits, which are admitted in evidence in their behalf, to wit: Defts. Ex. "I," letter of Dec. 14, 1912, to Mr. George Moore; Defts. Ex. "J," Order of George Moore of Dec. 16, 1912; and Defts. [41] Ex. "K," Affidavit of Patrick H. Bodkin; and Dennis Ocheltree having been called and sworn as a witness on behalf of the United States, and having given his testimony; and the Government having rested; and court, at the hour of

3:06 o'clock P. M., having taken a recess for 8 minutes; and now, at the hour of 3:14 o'clock P. M., court having reconvened; and defendants, counsel and the shorthand reporter being present as before; and the roll of the jury having been called, and all being present; and Arch Robison and Lee Wells, two of the defendants, having been respectively called and sworn as witnesses on behalf of defendants, and having given their testimony; it is, at the hour of 4:30 o'clock P. M., ordered that this cause be, and the same hereby is continued until Friday, the 10th day of April, 1914, at 10:30 o'clock A. M., for further trial, until which time the jurors are excused. [42]

At a stated term, to wit, the January Term, A. D. 1914, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Friday, the tenth day of April, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable OLIN WELLBORN, District Judge.

[Minutes of Trial—April 10, 1914.]

No. 655—CRIM. S. D.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

WILLIAM B. EDWARDS et al.,

Defendants.

This cause coming on this day to be further tried before the Court and a jury heretofore duly impanelled herein; Duke Stone, Esq., and Robert O'Connor, Esq., Assistant U. S. Attorneys, appearing as counsel for the United States; defendants being present on bail, with their counsel, Henry O. Willis, Esq., and J. O. Phillips, Esq.; John P. Doyle, being present as shorthand reporter of the testimony and proceedings, and acting as such; and the roll of the jury having been called, and all being present; and court having, at the hour of 10:35 o'clock A. M., taken a recess for 8 minutes; and now, at the hour of 10:43 o'clock A. M., court having reconvened; and defendants, counsel and shorthand reported being present as before; said cause is thereupon passed temporarily for further trial, to enable the Court to enter certain orders in other cases.

* * * * * [43]

No. 655—CRIM. S. D.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

WILLIAM B. EDWARDS et al.,

Defendants.

This cause coming on at this time to be further tried before the Court and a jury heretofore duly impanelled herein; Duke Stone, Esq., and Robert O'Connor, Esq., Assistant U. S. Attorneys, appearing as counsel for the United States; defendants being present in court on bail, with their counsel, Henry O. Willis, Esq., and J. O. Phillips, Esq.; John P. Doyle being present as shorthand reporter of the

testimony and proceedings, and acting as such; and the roll of the jury having been called, and all being present; and Lee Wells, one of the defendants, and a witness in their behalf, having resumed the stand for further examination, and having given his testimony; and Mary Shiffer, Arthur A. D. Barkelow and J. O. Phillips having respectively been called and sworn as witnesses on behalf of defendants, and having given their testimony; it is, at the hour of 12:05 o'clock P. M., ordered that this cause be, and the same hereby is continued until the hour of 2 o'clock P. M., of this day, for further trial, until which time the jurors are excused.

* * * * *

No. 655—CRIM. S. D.

THE UNITED STATES OF AMERICA,
Plaintiffs,
vs.
WILLIAM B. EDWARDS et al.,
Defendants.

This cause coming on at this time to be further tried before the Court and a jury heretofore duly impanelled herein; Duke Stone, Esq., and Robert O'Connor, Esq., Assistant U. S. Attorneys, appearing as counsel for the United States; defendants being present on bail, with their counsel, Henry O. Willis, Esq., [44] and J. O. Phillips, Esq.; John P. Doyle being present as shorthand reporter of the testimony and proceedings, and acting as such; and the roll of the jury having been called, and all being

present; and J. O. Phillips, a witness on behalf of defendants, having resumed the stand for further examination, and having given his testimony; and William Wells and Robert L. Culpepper, two of the defendants, having been called and sworn as witnesses on behalf of the defendants, and having given their testimony; and court, at the hour of 3:30 o'clock P. M., having taken a recess for 8 minutes; and now, at the hour of 3:38 o'clock P. M., court having reconvened; and defendants, counsel and the shorthand reporter being present as before; and the roll of the jury having been called, and all being present; and Robert L. Culpepper, one of the defendants, and a witness in their behalf, being on the stand for further examination, and having given his testimony; and John McLaren, one of the defendants, having been called and sworn as a witness in their behalf, but having given no testimony at this time; it is, at the hour of 4:15 o'clock P. M., ordered that the jurors be, and they hereby are excused until Tuesday, the 14th day of April, 1914, at 10:30 o'clock A. M.; and thereafter, at the hour of 4:49 o'clock P. M., it is ordered that this cause be, and the same hereby is continued until Tuesday, the 14th day of April, 1914, at 10:30 o'clock A. M. [45]

At a stated term, to wit, the January Term, A. D. 1914, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Tuesday, the fourteenth day of April, in the year of our Lord, one thousand nine hundred and fourteen. Present: The Honorable OLIN WELLBORN, District Judge.

[Minutes of Trial—April 14, 1914.]

No. 655—CRIM. S. D.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

WILLIAM B. EDWARDS et al.,

Defendants.

This cause coming on this day to be further tried before the Court and a jury heretofore duly impanelled herein; Duke Stone, Esq., Assistant U. S. Attorney, appearing as counsel for the United States; defendants being present on bail, with their counsel, Henry O. Willis, Esq.; John P. Doyle being present as shorthand reporter of the testimony and proceedings; and the roll of the jury having been called, in connection with the call of the roll of the entire panel of term trial jurors, and all being present; and the jury having, at the hour of 10:40 o'clock A. M., been excused until the hour of 2 o'clock P. M., of this day; and a question of law having been argued, on behalf of defendants, by Henry O. Willis,

Esq., of counsel for defendants; and court, at the hour of 11:11 o'clock A. M., having taken a recess for 4 minutes; and now, at the hour of 11:15 o'clock A. M., court having reconvened; and defendants, counsel and shorthand reporter being present as before; and a question of law having been further argued, on behalf of defendants, by Henry O. Willis, Esq., of counsel for defendants, and said question having also been argued by James M. Sheridan, Esq., Special Assistant to the U. S. [46] Attorney General, appearing as *amicus curiae*; and court, at the hour of 12:06 o'clock P. M., having taken a recess until the hour of 2 o'clock P. M., of this day;

And now, at the hour of 2 o'clock P. M., court having reconvened; and defendants, counsel and the shorthand reporter being present as before; and the roll of the jury having been called, and all being present; and the jurors having thereupon been excused from the courtroom temporarily; and a question of law having been further argued by James M. Sheridan, Esq., Special Assistant to the U. S. Attorney General, appearing as *amicus curiae*, and said question having also been further argued, on behalf of defendants, by Henry O. Willis, Esq., of counsel for defendants; and court, at the hour of 3:50 o'clock P. M., having taken a recess for 5 minutes; and now, at the hour of 3:55 o'clock P. M., court having reconvened; and defendants, counsel and the shorthand reporter being present as before; and the jury having been called into court; and the roll of the jury having been called, and all being present; it is, at the hour of 3:58 o'clock P. M., ordered that the

jurors be, and they hereby are excused until Wednesday, the 15th day of April, 1914, at 10:30 o'clock A. M.; and certain questions having been discussed by Henry O. Willis, Esq., of counsel for defendants, and by Duke Stone, Esq., Assistant U. S. Attorney, of counsel for the United States; it is, at the hour of 4:48 o'clock P. M., ordered that this cause be, and the same hereby is continued until Wednesday, the 15th day of April, 1914, at 10:30 o'clock A. M., for further trial. [47]

At a stated term, to wit, the January Term, A. D. 1914, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Wednesday, the fifteenth day of April, in the year of our Lord, one thousand nine hundred and fourteen. Present: The Honorable OLIN WELLBORN, District Judge.

[Minutes of Trial—April 15, 1914.]

No. 655—CRIM. S. D.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

WILLIAM B. EDWARDS et al.,

Defendants.

This cause coming on this day to be further tried before the Court and a jury heretofore duly impanelled herein; Duke Stone, Esq., and Robert O'Connor, Esq., Assistant U. S. Attorneys, appearing as

counsel for the United States; defendants being present on bail, with their counsel, Henry O. Willis, Esq.; John P. Doyle, being present as shorthand reporter of the testimony and proceedings, and acting as such; and the roll of the jury having been called in connection with the call of the roll of the entire panel of term trial jurors, and all the jurors being present in court; and John S. McLaren, one of the defendants, and a witness in their behalf, having resumed the stand for further examination, and having given his testimony; and C. E. Wells, having been called and sworn as a witness on behalf of defendants, and having given his testimony; and court, at the hour of 12:03 o'clock P. M., having taken a recess until the hour of 2 o'clock P. M., of this day;

And now, at the hour of 2 o'clock P. M., the court having reconvened; and defendants, counsel and shorthand reporter being present as before; and the roll of the jury having been called, and all being present; and C. E. Wells, a witness on behalf of [48] defendants, having resumed the stand for further examination, and having given his testimony; and Charles A. Shaw and Oscar Clayton having been respectively called and sworn as witnesses on behalf of defendants, and having given their testimony; and Mary Shiffer, heretofore sworn as a witness herein, having been recalled by defendants for further examination, and having given her testimony; and court, at the hour of 3:20 o'clock P. M., having taken a recess for 10 minutes; and now, at the hour of 3:30 o'clock P. M., court having reconvened; and defendants, counsel and shorthand reporter being

present as before; and the roll of the jury having been called, and all being present; and William B. Edwards, one of the defendants, having been called and sworn as a witness on behalf of said defendants, and having given his testimony; and court, at the hour of 3:55 o'clock P. M., having taken a recess for 10 minutes; and now, at the hour of 4:05 o'clock P. M., court having reconvened; and defendants, counsel and shorthand reporter being present as before; and the roll of the jury having been called, and all being present; and William B. Edwards, one of the defendants, and a witness in their behalf, having resumed the stand for further examination, and having given his testimony; it is, at the hour of 4:30 o'clock P. M., ordered that this cause be, and the same hereby is continued until Thursday, the 16th day of April, 1914, at 10:30 o'clock A. M., for further trial, until which time the jurors are excused. [49]

At a stated term, to wit, the January Term, A. D. 1914, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Thursday, the sixteenth day of April, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable OLIN WELLBORN, District Judge.

[Minutes of Trial—April 16, 1914.]

No. 655—CRIM. S. D.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

WILLIAM B. EDWARDS et al.,

Defendants.

This cause coming on this day to be further tried before the Court and a jury heretofore duly impanelled herein; Duke Stone, Esq., and Robert O'Connor, Esq., Assistant U. S. Attorneys, appearing as counsel for the United States; John P. Doyle being present as shorthand reporter of the testimony and proceedings, and acting as such; defendants being present on bail, with their counsel, Henry O. Willis, Esq.; and the roll of the jury having been called, in connection with the call of the roll of the entire panel of term trial jurors, and all being present in court; and William B. Edwards, one of the defendants, and a witness in their behalf, having resumed the stand for further examination, and having given his testimony; and in connection with the cross-examination of said witness, the Government having offered a complaint, a warrant of arrest and a judgment, which together are admitted in evidence as U. S. Ex. 12; and John McLaren, one of the defendants, and a witness in their behalf, having been recalled for further examination, and having given his testimony; and, in connection with the cross-examination of said witness, the Government having

offered a notice of July 29th, 1911, which is admitted [50] in evidence as U. S. Ex. 13; and J. M. Ocheltree, a witness on behalf of the United States, having been recalled for defendants for further examination, and having given his testimony; and, in connection with the testimony of said witness, defendants having offered an affidavit of James M. Ocheltree, P. H. Bodkin et al., and an envelope, which are together admitted in evidence as Defts. Exhibit "L"; and defendants having rested; and Dudley W. Robinson having been called and sworn as a witness on behalf of the United States in rebuttal, and having given his testimony; and the Government having rested; it is, at the hour of 12:12 o'clock P. M., ordered that the jurors be, and they hereby are, excused until the hour of 2 o'clock P. M., of this day; and court having, at the hour of 12:13 o'clock P. M., taken a recess for 3 minutes; and now, at the hour of 12:16 o'clock P. M., court having reconvened; and defendants and counsel being present as before; and points of law concerning instructions to the jury having been discussed by counsel for the respective parties; and counsel for the Government having waived the provisions of Rule 22 of the Rules of Practice of this court requiring exceptions to the charge of the Court to be handed to the Judge in writing before the jury leave the box; it is, at the hour of 1:05 o'clock P. M., ordered that this cause be, and the same hereby is continued for further trial until the hour of 2 o'clock P. M., of this day.

* * * * *

No. 655—CRIM. S. D.

THE UNITED STATES OF AMERICA,
Plaintiffs,
vs.
WILLIAM B. EDWARDS et al.,
Defendants.

This cause coming on at this time to be further tried before the Court and a jury heretofore duly impanelled herein; Duke [51] Stone, Esq., and Robert O'Connor, Esq., Assistant U. S. Attorneys, appearing as counsel for the United States; defendants being present on bail, with their counsel, Henry O. Willis, Esq.; John P. Doyle being present as shorthand reporter of the testimony and proceedings, and acting as such; and the roll of the jury having been called and all being present; and the case having been reopened for further testimony; and D. D. Ocheltree, a witness on behalf of the United States, having been recalled for further examination, and having given his testimony; and said cause having been argued to the jury, on behalf of the Government by Robert O'Connor, Esq., Assistant U. S. Attorney, of counsel for the United States, and on behalf of defendants by Henry O. Willis, Esq., of counsel for defendants; and court, at the hour of 3:36 o'clock P. M., having taken a recess for 7 minutes; and now, at the hour of 3:45 o'clock P. M., court having reconvened; and defendants, counsel and the shorthand reporter being present as before; and the roll of the jury having been called, and all

being present; and said cause having been further argued to the jury on behalf of the Government, in reply, by Duke Stone, Esq., Assistant U. S. Attorney, of counsel for the Government; it is, at the hour of 4:30 o'clock P. M., ordered that this cause be, and the same hereby is continued until Friday, the 17th day of April, 1914, at 10:30 o'clock A. M., for further trial, until which time the jurors are excused. [52]

At a stated term, to wit, the January Term, A. D. 1914, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Friday, the seventeenth day of April, in the year of our Lord, one thousand nine hundred and fourteen. Present: The Honorable OLIN WELLBORN, District Judge.

[Minutes of Trial—April 17, 1914.]

No. 655—CRIM. S. D.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

WILLIAM B. EDWARDS et al.,

Defendants.

This cause coming on this day to be further tried before the Court and a jury heretofore impanelled herein; Duke Stone, Esq., and Robert O'Connor, Esq., Assistant U. S. Attorneys, appearing as counsel for the United States; defendants being present on bail, with their counsel, Henry O. Willis, Esq.;

John P. Doyle being present as shorthand reporter of the proceedings, and acting as such; and the roll of the jury having been called, in connection with the call of the roll of the entire panel of term trial jurors, and all being present in court; and Duke Stone, Esq., Assistant U. S. Attorney, of counsel for the United States, and Henry O. Willis, Esq., of counsel for defendants having stipulated that counsel may, at any time during this day, except to the charge of the Court, without the presence of the jury, specifying in writing their exceptions, according to the provisions of Rule 22 of the Rules of Practice of this court; and the Court having read to the jury its written instructions; it is ordered that the instructions requested by the Government, and also the instructions requested by defendants be, and they hereby are refused, except in so far as the same may have been [53] embodied in the instructions given by the Court; and the jury, at the hour of 11 o'clock A. M., having retired to consider their verdict; now, on motion of Henry O. Willis, Esq., of counsel for defendants, it is ordered that exceptions be, and they hereby are noted herein in the matter of instructions to the jury, as follows, to wit, that exceptions be, and they hereby are noted, on behalf of defendants, to the instruction given on page 5 of the instructions of the Court reading as follows: "The Court further instructs you, that the said Ocheltree, by virtue of the allowance on June 1st, 1912, at the United States Land Office, Los Angeles, California, of his application previously filed in said office, to wit: May 18th, 1910, to enter as a homestead the land

described in said first count, acquired the right, by the Constitution and laws of the United States, to make settlement and residence upon said land and cultivate the same and in other respects comply with the public land laws of the United States relating to homesteads, so as to earn and procure title to said land''; that exceptions be, and they hereby are noted, on behalf of defendants, to the instruction given on page 7 of the instructions of the Court, reading as follows: "The Court further instructs you, that the said Bodkin, by virtue of the allowance on June 1st, 1912, at the United States Land Office, Los Angeles, California, of his application previously filed in said office, to wit: May 18th, 1910, to enter as a homestead the land described in said second count, acquired the right, by the Constitution and laws of the United States, to make settlement and residence upon said land, and cultivate the same, and in other respects comply with the public land laws of the United States relating to homesteads, so as to earn and procure title to said land''; and that exceptions be, and they hereby are noted, on behalf of defendants, to the refusal of the Court to give the instructions requested by defendants on pages 5 and 6 of their requested instructions, to wit: "You are instructed [54] that under the laws of the United States a right, called a preference right, is created and vested in the successful contestant of any homestead entry made and filed on any public land of the United States. You are further instructed that such preference right as created by law gives to such successful contestant the right, above all others, to enter the lands involved

in the contest, within thirty days after notice of the cancellation of such former entry by the Commissioner of the General Land Office. You are further instructed that, if during the thirty days succeeding such notice the said lands have been and remain withdrawn from all forms of entry, the said preference right becomes extinct and is of no further force nor effect. You are further instructed that no rule, regulation nor decision of any of the officers of the Land Department of the United States can extend such right beyond the thirty days above stated, and that no ruling, action or decision of the Land Department of any of its officers, extending such right, or granting such right, can create or give the successful contestant any preferred right of entry or settlement on such land. And if you believe from the evidence in this case that Patrick H. Bodkin and James M. Ocheltree, respectively secured a preference right as above described but did not exercise it within thirty days after notice of the cancellation by the Commissioner of the General Land Office of the contested entry, by filing an entry upon the land involved in such contests, respectively, then you are instructed that such preference right became extinct, and any ruling or decision, made thereafter, by any of the officers of the Land Department, based upon such preference right, was null and void, and conferred no right upon said Bodkin or said Ocheltree which is embraced in, or protected by Section 19 of the Penal Code of the United States, under which these defendants are indicted, and you must therefore acquit the defendants.” [55]

No. 655—CRIM. S. D.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

WILLIAM B. EDWARDS et al.,

Defendants.

Now, at the hour of 11:52 o'clock, A. M., the jury having been called into court; Duke Stone, Esq., and Robert O'Connor, Esq., Assistant U. S. Attorneys, appearing as counsel for the United States; defendants being present on bail, with their counsel, Henry O. Willis, Esq.; John P. Doyle being present as shorthand reporter of the proceedings, and acting as such; and the roll of the jury having been called, and all being present; and the jury having been asked if they have agreed upon a verdict, and having replied that they have not so agreed; it is ordered that the U. S. Marshal for this District take said jurors to some suitable place for their dinner, said dinner for jurors and the accompanying officers to be at the expense of the United States, and that thereafter said Marshal return the jury to their room for further deliberation concering their verdict.

* * * * *

No. 655—CRIM. S. D.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

WILLIAM B. EDWARDS et al.,

Defendants.

The jury having now, at the hour of 3:52 o'clock P. M., come into court; Duke Stone, Esq., and Robert O'Connor, Esq., Assistant U. S. Attorneys, appearing as counsel for the United States; defendants being present on bail with their counsel, Henry O. Willis, Esq.; and the roll of the jury having been called, and all being present; and the jury having been asked if they have agreed upon a verdict, and having through their foreman replied that they [56] have not so agreed, and the jury through their foreman having asked of the Court further instructions, to wit, an instruction as to whether or not they can agree as to five defendants with no verdict as to the remaining defendant; and the jury, at the hour of 3:53 o'clock P. M., having by order of the court been taken back to the jury-room, without further instructions; and the jury, at the hour of 4:10 o'clock P. M., having been by the Court called into court; and defendants and counsel being present as before; John P. Doyle being present as shorthand reporter of the proceedings, and acting as such; and the roll of the jury having been called, and all being present; and the jury having been asked if they still desire to receive said further instruction requested by them, and having replied that they do; and the Court having thereupon further instructed the jury as follows, to wit: "If you cannot agree upon a verdict as to all of the defendants, you may return a verdict as to one or more of them in regard to whom you do agree, and verbally report a disagreement as to the defendant or defendants in

regard to whom you cannot agree''; and the jury, at the hour of 4:13 o'clock P. M., having retired further to consider their verdict; now, at the hour of 4:22 o'clock P. M., come the jury; and the roll of the jury having been called, and all being present; and counsel, defendants and the shorthand reporter being present as before; and the jurors having been asked if they have agreed upon a verdict, and having by their foreman replied that they have so agreed as to five of the defendants, and having been required to state their verdict, and their verdict having been read by the foreman; now, by direction of the Court, said verdict is filed and recorded by the clerk, said verdict being as follows, and the following being the record thereof, to wit: [57]

In the District Court of the United States, for the Southern District of California, Southern Division.

No. 655—CRIM. S. D.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

WILLIAM B. EDWARDS, ROBERT L. CULPEPPER, JOHN McLAREN, WILLIAM WELLS, LEE WELLS and ARCH ROBISON,

Defendants.

VERDICT.

We, the jury in the above-entitled cause, find the defendants William B. Edwards and Robert L. Cul-

pepper guilty as charged in the indictment, and the defendants John McLaren, William Wells and Arch Robison, not guilty as charged in the indictment.

Los Angeles, April 17th, 1914.

FRANK H. SMITH,

Foreman.

And said verdict having been read to the jury as so recorded and the jurors having said that it is their verdict; and the jurors having also verbally announced that they cannot agree as to the defendant Lee Wells; and said jurors having also asked the mercy of the Court for defendants William B. Edwards and Robert L. Culpepper; it is ordered that the jurors be, and they hereby are discharged from the case as to defendant Lee Wells for failure to agree; and it is further ordered that said jurors be, and they hereby are excused until Tuesday, the 21st day of April, 1914, at 10:30 o'clock A. M.; and it is further ordered that the defendants John McLaren, William Wells and Arch Robison, found not guilty by the jury, be, and they hereby are discharged; and it is further ordered on motion of Duke Stone, Esq., Assistant U. S. Attorney, of counsel for the United States, and with the consent of Henry O. Willis, Esq., of counsel for defendants, that for the setting of the same down for the trial of defendant, Lee Wells, this cause be, and the same hereby is continued for the term, said defendant Lee Wells to remain under his present [58] bail; and it is further ordered, on motion of Henry O. Willis, Esq., of counsel for defendants, and by consent, that this cause be, and the same hereby is continued until Monday, the

18th day of May, 1914, at 10:30 o'clock A. M., for the sentence of defendants William B. Edwards and Robert L. Culpepper, and also for a motion for a new trial of said defendants, for the presentation of a bill of exceptions, and for such other action as said defendants may be advised to take; and it is further ordered, on motion of Henry O. Willis, Esq., of counsel for defendants, and with the consent of Duke Stone, Esq., Assistant U. S. Attorney, of counsel for the United States, that defendants William B. Edwards and Robert L. Culpepper, remain under their present bail, pending sentence. [59]

[Verdict.]

In the District Court of the United States, for the Southern District of California, Southern Division.

No. 655—CRIM. S. D.

THE UNITED STATES OF AMERICA,
Plaintiffs,

vs.

WILLIAM B. EDWARDS, ROBERT L. CULPEPPER, JOHN McLAREN, WILLIAM WELLS, LEE WELLS and ARCH ROBISON,

Defendants.

We, the jury in the above-entitled cause, find the defendants William B. Edwards and Robert L. Culpepper, guilty as charged in the indictment, and the

defendants John McLaren, William Wells and Arch Robison not guilty as charged in the indictment.

Los Angeles, April 17th, 1914.

FRANK H. SMITH,

Foreman. [60]

[Indorsed]: "655 Crim. U. S. District Court, Southern District of Calif., Southern Division. United States vs. Wm. B. Edwards et al. Verdict. Filed April 17, 1914. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk." [61]

Copy Judgment.

At a stated term, to wit, the January Term, A. D. 1914, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Monday, the eighteenth day of May, in the year of our Lord, one thousand nine hundred and fourteen. Present: The Honorable OLIN WELLBORN, District Judge.

No. 655—CRIM. S. D.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

WILLIAM B. EDWARDS et al.,

Defendants.

This cause coming on at this time to be further heard on defendants' motion for a new trial; Duke

Stone, Esq., Assistant U. S. Attorney, appearing as counsel for the United States; defendants William B. Edwards and Robert L. Culpepper being present on bail, with their counsel, Henry M. Willis, Esq.; and said motion for a new trial having been further argued, in support thereof, by Henry M. Willis, Esq., of counsel for the defendants, and in opposition thereto by Duke Stone, Esq., Assistant U. S. Attorney, of counsel for the United States, and said cause having been submitted to the Court for its consideration and decision on said motion for a new trial and the oral argument thereof; it is now by the Court ordered that defendants' said motion for a new trial be, and the same hereby is denied, to which ruling of the Court, on motion of defendants and by direction of the Court, exceptions are hereby noted herein on behalf of said defendants; and defendants, William B. Edwards and Robert L. Culpepper, having thereupon been called for sentence; and statements [62] in mitigation of sentence having been made by Henry M. Willis, Esq., of counsel for said defendants; and statements concerning sentence having been made by Duke Stone, Esq., Assistant U. S. Attorney, of counsel for the United States; the Court thereupon pronounces sentence upon said two defendants for the offense of which they now stand convicted, namely: the offense of conspiracy to injure, oppress, etc., citizens in the exercise of civil rights in violation of Section 19 of the United States Criminal Code, as follows, to wit: The Judgment of the Court is, that the defendants, William B. Edwards and Robert L. Culpepper pay

a fine of one hundred (100) dollars each, and that each of said two defendants be imprisoned for the term of four (4) months in the county jail of Riverside County, California; and said defendants having been remanded to the custody of the U. S. Marshal; it is, on motion of counsel for the Government, ordered that the bail of each of said defendants Edwards and Culpepper, to be given on filing herein and allowance of petition for writ of error, be, and the same hereby is fixed, at \$3,000.00; whereupon assignments of error and a petition for writ of error are filed on behalf of said two defendants and an order allowing writ of error and supersedeas and fixing bail is signed and filed in open court; thereupon, on motion of Henry M. Willis, Esq., of counsel for defendants, it is ordered that defendants be, and hereby are granted thirty (30) days within which to file their proposed bill of exceptions herein.

(Margin.) Amended June 16, 1914, per minute order of June 16, 1914. C. E. Scott, Deputy Clerk.
[63]

[Certificate of Clerk to Judgment-roll.]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. 655—CRIM. S. D.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

WILLIAM B. EDWARDS et al.,

Defendants.

I, Wm. M. Van Dyke, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing to be a true copy of the Judgment entered in the above-entitled action; and I do further certify that the foregoing papers hereto annexed, constitute the Judgment-roll in said action.

Attest my hand and the seal of said District Court this 21st day of May, A. D. 1914.

[Seal]

WM. M. VAN DYKE,

Clerk.

By Leslie S. Colyer,

Deputy Clerk. [64]

At a stated term, to wit, the January Term, A. D. 1914, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Tuesday, the thirty-first day of March, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable OLIN WELLBORN, District Judge.

[Minutes of Trial—March 31, 1914.]

No. 655—CRIM. S. D.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

WILLIAM B. EDWARDS et al.,

Defendants.

This cause coming on this day for the trial of defendants William B. Edwards, Robert L. Culpepper, John McLaren, William Wells, and Arch Robinson, who are present in Court on bail, before the Court and a jury to be impanelled; Duke Stone, Esq., Assistant U. S. Attorney, appearing as counsel for the United States; now, on motion of Henry O. Willis, Esq., and it appearing that Robert L. Handley, of counsel for defendants, consents thereto, it is ordered that J. O. Phillips, Esq., and Henry O. Willis, Esq., be, and they hereby are associated with Robert L. Hanley, Esq., as counsel for defendants; whereupon, good cause appearing therefor, it is ordered that this cause be, and the same hereby is, continued until Wednesday, April 1, 1914, at 10:30 A. M. [65]

At a stated term, to wit, the January Term, A. D. 1914, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Wednesday, the first day of April, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable OLIN WELLBORN, District Judge.

[Minutes of Trial—April 1, 1914.]

No. 655—CRIM. S. D.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

WILLIAM B. EDWARDS et al.,

Defendants.

This cause coming on this day for the trial of defendants William B. Edwards, Robert L. Culpepper, John McLaren, Wm. Wells and Arch Robison, who are all present in court, on bail, before the Court and a jury to be impanelled; Duke Stone, Esq., Assistant U. S. Attorney, appearing as counsel for the United States; J. O. Phillips, Esq., and Henry O. Willis, Esq., appearing as counsel for defendants; now, on motion of Duke Stone, Esq., Assistant U. S. Attorney, of counsel for the United States, and with the consent of Henry O. Willis, Esq., of counsel for defendants, it is ordered that this cause be, and the same hereby is continued until Thursday, the 2d day of April, A. D. 1914, at 10:30 o'clock A. M., for said trial. [66]

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

WILLIAM B. EDWARDS, ROBERT L. CUL-
PEPPER et als.,

Defendants.

Motion for a New Trial.

Come now the defendants, William B. Edwards and Robert L. Culpepper, and move the Court and each of them moves the Court to set aside the verdict heretofore on the 17th day of April, 1914, rendered

herein, and for a new trial in this case on the following grounds:

I.

That the Court misdirected the jury in matters of law.

II.

That the Court erred in decisions of questions of law arising during the course of the trial.

III.

That the verdict is contrary to the law.

IV.

That the verdict is contrary to the evidence.

V.

That the verdict is contrary to the law and the evidence.

VI.

That the evidence is insufficient to justify the verdict. [67]

This motion is made upon the files, records, and papers in this case and the testimony taken at the trial thereof.

HENRY M. WILLIS,
J. O. PHILLIPS,
Attorneys for the Defendants.

[Endorsed]: No. 655—Crim. United States District Court, Southern District of California, Southern Division. The United States of America, Plaintiffs, vs. William B. Edwards et al., Defendants. Motion for New Trial. Service of Within Motion by Copy Admitted this 18th day of May, 1914. Robert O'Connor, Asst. United States Attorney. Filed May 18, 1914. Wm. M. Van Dyke, Clerk. By Leslie S.

Colyer, Deputy. Henry M. Willis, 412-413 Katz Block, San Bernardino, California, Attorneys at Law. [68]

At a stated term, to wit, the January Term, A. D. 1914, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Tuesday, the sixteenth day of June, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable OLIN WELLBORN, District Judge.

[Minutes of Court—June 16, 1914—Re Correction of Minutes, etc.]

No. 655—CRIM. S. D.

THE UNITED STATES OF AMERICA,
Plaintiffs,

vs.

WILLIAM B. EDWARDS et al.,
Defendants.

Duke Stone, Esq., Assistant U. S. Attorney, appearing as counsel for the United States; Henry M. Willis, Esq., appearing as counsel for defendants; on motion of Henry M. Willis, Esq., of counsel for the defendants, and with the consent of Duke Stone, Esq., Assistant U. S. Attorney, of counsel for the United States, it is ordered that the minutes of this court in this cause made and entered on May 18th, 1914, containing proceedings and orders upon hearing of a motion for a new trial and the sentence of

said defendants be corrected, to conform to the facts, by adding, at the end thereof, the following, to wit: "Thereupon, on motion of Henry M. Willis, Esq., of counsel for defendants, it is ordered that defendants be, and hereby are granted thirty (30) days within which to file their proposed bill of exceptions herein"; said amendment and correction be made by the clerk, and attested by him with a reference to this order; and it is further ordered that the copy of said minute order issued by the clerk and incorporated in the judgment-roll in this cause be likewise corrected in accordance with the [69] foregoing said correction to be made by the clerk and attested by him with a reference to this order.

Thereupon, on motion of Henry M. Willis, Esq., of counsel for defendants, and pursuant to the stipulation of the parties, by their solicitors of record, now filed in open court, it is ordered that defendants be, and they hereby are granted until and including August 1st, 1914, within which to prepare and file their proposed bill of exceptions herein, and thereupon an order accordingly is signed in open court.
[70]

*In the District Court of the United States, for the
Southern District of California, Southern Division.*

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

WILLIAM B. EDWARDS et al.,

Defendants.

Order Fixing Time to Prepare Bill of Exceptions.

Pursuant to the written stipulation signed by counsel for the respective parties in the above-entitled action and this day filed herein, good cause appearing therefor:

IT IS HEREBY ORDERED that the defendants William B. Edwards and Robert L. Culpepper in the above-entitled cause may have to and including the first day of August, 1914, within which to prepare, serve and file their proposed Bill of Exceptions.

OLIN WELLBORN,

District Judge.

June 16, 1914.

[Endorsed]: Original. No. 655—Crim. In the District Court of the United States, for the Southern District of California, Southern Division. The United States of America, Plaintiffs, vs. William B. Edwards et als., Defendants. Order Fixing Time to Prepare Bill of Exceptions. Filed June 16, 1914. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. Henry M. Willis, 412-413 Katz Block, San Bernardino, California, Attorneys at Law. [71]

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILLIAM B. EDWARDS and ROBERT L. CUL-
PEPPER et al.,

Defendants.

Engrossed Bill of Exceptions.

Be it remembered that heretofore, to wit, on the 11th day of July, 1913, the Grand Jury of the United States in and for the Southern District of California, Southern Division, did find and return into the above-entitled court its indictment against the defendants William B. Edwards, Robert L. Culpepper, John McLaren, Lee Wells, William Wells and Arch Robison, for violation of Section 19, Federal Penal Code of 1910; that thereafter the said defendants were duly arraigned upon the said indictment and duly entered their pleas of not guilty thereto; that thereafter the said cause was duly set for trial in the above-entitled court to be tried on the 31st day of March, 1914; that thereafter, upon the second day of April, 1914, said cause came on duly and regularly for trial, the Government being represented by Hon. Duke Stone and Robert O'Connor, Assistant United States District Attorneys for the Southern District of California, and the defendants being represented by Messrs. Henry M. Willis and J. O. Phillips. Thereupon a jury to try the cause was duly and regularly empanelled and testimony, both oral and written, was offered and introduced on the part of the United States of America, and by [72] the defendants on their own behalf; that the taking of the testimony herein referred to was duly and regularly proceeded with, and occupied the time of the Court from the second day of April, 1914, to the 17th day of April, 1914; and that the defendants only present so much

of the evidence taken on the trial of this cause as will enable the Honorable Circuit Court of Appeals to pass upon the question as to whether or not the Court misdirected the jury in matters of law and as to whether or not the Court erred in refusing certain instructions, the error alleged by plaintiffs in error alone consisting in the giving and refusing of certain instructions, as hereinafter set out in this bill of exceptions; that thereupon, after the argument of counsel, the Court duly and regularly gave its charge to the jury and submitted the case to them for their decision, as follows, to wit:

“Gentlemen of the Jury:

“This indictment was found under Section 19 of the United States Criminal Code, which is, in substance, as follows: ‘If two or more persons conspire to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States . . . they shall be’ punished as in said Section prescribed.

“There are two counts in the indictment.

“The charge in the first count, comprehensively stated, is, that the defendants conspired to injure, oppress, threaten and intimidate a certain citizen of the United States, to wit, one James M. Ocheltree, in the free exercise and enjoyment of the right and privilege secured to him by the Constitution and laws of the United States to make effectual the homestead entry in said first count mentioned by entering into possession of, making settlement upon and residing upon, cultivating and [73] improving the land

embraced in said homestead entry, and in other respects complying with the public land laws of the United States relating to homesteads, and thereby earning and procuring patent to land embraced in said homestead entry.

“As the indictment has been read in full to you and besides will be with you in the jury-room, it is unnecessary here to recite its contents at length.

“It is admitted that said Ocheltree is, and at all times mentioned in the indictment was, a citizen of the United States, and that Patrick H. Bodkin, the person named in the second count, is, and at all times mentioned in the indictment was, a citizen of the United States.

“You will need to consider, with reference to the first count, the following among other questions:

“Was there a conspiracy to injure, oppress, threaten or intimidate said Ocheltree, as alleged in the first count?

“If there was such a conspiracy, were these defendants, or any of them parties to it:

“If the evidence satisfies you beyond a reasonable doubt of the existence of said conspiracy, and, that all the defendants were parties to said conspiracy, you will find them guilty as charged in the first count; or, if the evidence satisfies you beyond a reasonable doubt of the existence of said conspiracy and, that some of the defendants participated in such conspiracy, but fails to so satisfy you as to others, you will on the first count convict the defendants whom you find participated in such conspiracy, and acquit the others. If, however, the evidence fails to satisfy

you beyond a reasonable doubt of the existence of said conspiracy, you will find the defendants not guilty on the first count.

“The Court further instructs you, that the said Ocheltree, by virtue of the allowance on June 1st, 1912, at the United [74] States Land Office, Los Angeles, California, of his application previously filed in said office, to wit, May 18th, 1910, to enter as a homestead the land described in said first count, acquired the right, by the Constitution and laws of the United States, to make settlement and residence upon said land and cultivate the same and in other respects comply with the public land laws of the United States relating to homesteads, so as to earn and procure title to said land.

“The charge in the second count, comprehensively stated, is, that the defendants conspired to injure, oppress, threaten and intimidate a certain citizen of the United States, to wit: one Patrick H. Bodkin, in the free exercise and enjoyment of the right and privilege secured to him by the Constitution and laws of the United States to make effectual the homestead entry in said second count mentioned by entering into possession of, making settlement upon and residing upon, cultivating and improving the land embraced in said homestead entry, and in other respects complying with the public land laws of the United States relating to homesteads, and thereby earning and procuring patent to the land embraced in said homestead entry.

“If the evidence satisfies you beyond a reasonable doubt of the existence of said conspiracy and that all

the defendants were parties to said conspiracy, you will find them guilty as charged in the second count; or, if the evidence satisfies you beyond a reasonable doubt of the existence of said conspiracy, and, that some of the defendants participated in said conspiracy, but fails to so satisfy you as to the others, you will on said second count convict the defendants whom you find participated in said conspiracy and acquit the others. If, however, the evidence fails to satisfy you beyond a reasonable doubt of the existence of said conspiracy, you will find the defendants not guilty on said second count. [75]

“The Court further instructs you, that the said Bodkin, by virtue of the allowance on June 1st, 1912, at the United States Land Office, Los Angeles, California, of his application previously filed in said office, to wit: May 18th, 1910, to enter as a homestead the land described in said second count, acquired the right, by the Constitution and laws of the United States, to make settlement and residence upon said land and cultivate the same and in other respects comply with the public land laws of the United States relating to homesteads, so as to earn and procure title to said land.

“The Court further charges you, that a conspiracy is a combination between two or more persons to do a criminal or unlawful act, or a lawful act by criminal or unlawful means.

“From this definition of conspiracy, it follows, of course, that there can be no conspiracy where on individual acts by and for himself only.

“A mere mental purpose cannot justify a convic-

tion of conspiracy. A common design is of the essence of the charge.

“A person, therefore, in order to become a party to a conspiracy, must combine with someone else to effect the object of the conspiracy by the means agreed upon.

“The Court further instructs you, that, to constitute a conspiracy, it is not necessary, that there should be an explicit or formal agreement between the alleged conspirators.

“Though the common design is of the essence of the charge, it is not necessary to prove that the defendants came together and actually agreed in terms to have that design, and to pursue it by common means. If it be proved that the defendants pursued by their acts the same object, often by the same means, one performing one part, and another another part of the same so as to complete it, with a view of attaining the same object, the jury will be justified in the conclusion, that they were [76] engaged in a conspiracy to effect that object.

“The evidence in proof of the conspiracy may be, and from the nature of the case generally will be, circumstantial.

“The Court further instructs you, that, where circumstantial evidence is relied upon to establish the conspiracy, or any other fact, it is not only necessary, that all the circumstances concur to show the existence of the conspiracy or other fact sought to be proved, but such circumstantial evidence must be inconsistent with any other rational conclusion.

“If the evidence can be reconciled either with the

theory of innocence or with guilt, the law requires that the defendant be given the benefit of the doubt, and that the theory of innocence be adopted.

“The Court further instructs you, that, in determining the question of the formation or existence of a conspiracy, the acts and declarations of the persons accused may, among other circumstances, be looked to and considered by the jury, but guilt cannot be fastened upon any person by the declarations or statements, oral or written, made by others. To establish the connection of anyone of the defendants with the conspiracy, such connection must be shown by facts and circumstances, or by his own acts, conduct or declarations, independent of the declarations of others, and until this fact is thus established, he is not bound by the declarations or statements of others.

“The Court further instructs you, that, while the declarations of a co-conspirator cannot prove the existence of the conspiracy itself, any declarations made by one of the conspirators during the existence, and in furtherance of the unlawful combination, when proven, is not only evidence against him, but is evidence against the other conspirators, who, if the combination is proved, are as much responsible for such declarations as if made by themselves. [77]

“You must not, however, permit yourselves to use against either defendant anything said or done outside the presence of such defendant, unless you believe from the evidence beyond a reasonable doubt, that at the time the things were said or done a conspiracy existed between the party saying and doing the things and the defendant to be affected thereby.

In such a case it is only those things said or done in furtherance of the objects of the conspiracy which are chargeable against the other member, or members, of such conspiracy.

“The Court further instructs you, that you are the sole judges of the facts and the credibility of witnesses, and, in passing upon the credibility of witnesses, you may consider, among other things, their intelligence, their relation to the controversy and to the parties; the interest, if any, they have in the result of the trial; their prejudices and motives, their hopes and fears; their bias or impartiality; the reasonableness, or otherwise, of the statements they make,—together with their manner upon the witness-stand, and should give to their testimony such weight as you believe it entitled to receive.

“If a witness is shown knowingly to have testified falsely on the trial touching any material matter here involved, the jury may distrust his testimony in other respects, and are at liberty to reject the whole or any part of it.

“Testimony has been introduced as to the good character of the defendants. On this subject, the court charges you, that the good character of a person accused of a crime, when proven, is itself a fact in the case; it must be considered in connection with all the other facts and circumstances adduced in evidence on the trial, and if, after such consideration, the jury are not satisfied, beyond a reasonable doubt, of the defendants’ guilt, they should acquit them. If, however, they are so satisfied from all evidence in the case, that the [78] defendants are guilty, they

should convict them, notwithstanding proof of good character.

“The Court further instructs you, that the finding of an indictment raises no presumption whatever of a defendant’s guilt, but the burden of proof is on the Government, and that the law presumes the defendant innocent until proven guilty beyond a reasonable doubt, and, that this rule applies to every material element of the offense charged. The Court further instructs you, that a reasonable doubt is one which is reasonable in view of all the evidence, and if, after an impartial comparison and consideration of all the evidence, you can candidly say that you are not satisfied of the defendant’s guilt, you have a reasonable doubt; but if, after such impartial comparison and consideration of all the evidence, you can truthfully say that you have an abiding conviction of the defendant’s guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, you have no reasonable doubt.”

That thereafter, to wit, on April 17, 1914, said jury duly and regularly returned into court their verdict, finding the defendants William B. Edwards and Robert L. Culpepper guilty as charged in the indictment; that the time for sentencing said defendants was duly continued by the Court until the 18th day of May, 1914, upon which date the said defendants William B. Edwards and Robert L. Culpepper filed in said court their motion for a new trial; that thereupon, on the said 18th day of May, 1914, the Court

duly and regularly heard the motion of said defendants for a new trial, and duly and regularly made its order denying said motion. Thereupon the Court duly and regularly pronounced sentence upon the defendants William B. Edwards and Robert L. Culpepper, adjudging that *he* and each of them should pay a fine in the sum of one hundred dollars and be [79] imprisoned in the county jail of the County of Riverside for the period of four months. Thereupon, on the said 18th day of May, 1914, the defendants and each of them duly and regularly filed in said court their assignment and specification of errors in words and figures as follows, to wit:

“In the District Court of the United States, in and for the Southern District of California, Southern Division.

“THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

“WILLIAM B. EDWARDS, ROBERT L. CULPEPPER et al.,

Defendants.

“ASSIGNMENT OF ERRORS.

“William B. Edwards and Robert L. Culpepper, the defendants in the above-entitled cause, and plaintiffs in error herein, having petitioned for an order from said Court permitting them and each of them to procure a Writ of Error from this Court, directed from the United States Circuit Court of Appeals for

the Ninth Circuit, from the judgment and sentence made and entered in said cause against the said William B. Edwards and Robert L. Culpepper and each of them, plaintiffs in error, and petitioners herein, now make and file, and each of them now makes and files with their said petition the following assignments of errors herein, upon which they and each of them will rely for a reversal of said judgment and sentence upon said writ, and which said errors and each and every of them, are to the great detriment, injury and prejudice of the said defendants and each of them, and in violation of the rights conferred upon them and each of them by law; and they and each of them says that in the record of proceedings in the above-entitled cause, upon the hearing and determination thereof, in the District Court of the United States for the Southern District of California, Southern Division, there is manifest error in this, to wit:

“1. That the District Court erred in refusing to give the [80] following instruction requested by the said defendants, to wit:

“ ‘You are instructed that under the laws of the United States a right, called a preference right, is created and vested in the successful contestant of any homestead entry made and filed on any public land of the United States.

“ ‘You are further instructed that such preference right as created by law gives to such successful contestant the right, above all others, to enter the lands involved in the contest, within thirty days after notice of the cancellation of such former entry by the Com-

missioner of the General Land Office.

“ ‘You are further instructed that, if during the thirty days succeeding such notice the said lands have been and remain withdrawn from all forms of entry, the said preference right becomes extinct and is of no further force nor effect.

“ ‘You are further instructed that no rule, regulation nor decision of any of the officers of the Land Department of the United States can extend such right beyond the thirty days above stated, and that no ruling, action or decision of the Land Department or any of its officers, extending such right, or granting such right, can create or give the successful contestant *and* preferred right of entry or settlement on such land. And if you believe from the evidence in this case that Patrick H. Bodkin and James L. Ocheltree, respectfully, secured a preference right as above described, but did not extend it within thirty days after notice of the cancellation by the Commissioner of the General Land Office of the contested entry, by filing an entry upon the land involved in such contests, *respectfully*, then you are instructed that such preference right becomes extinct, and any ruling or decision, made thereafter, by any of the officers of the Land Department, based upon such preference right, was null and void and conferred no right upon said Bodkin, or said Ocheltree which is embraced in, or protected by Section 19 of the [81] Penal Code of the United States, under which these defendants are indicted, and you must therefore acquit the defendants.’

“2. That the said District Court erred in giving to the jury the following instruction, to wit:

“ ‘The Court further instructs you that the said Ocheltree, by virtue of the allowance on June 1st, 1912, at the United States Land Office, Los Angeles, California, of his application previously filed in said office, to wit, May 18th, 1910, to enter as a homestead the land described in said first count, acquired the right, by the Constitution and laws of the United States, to make settlement and residence upon said land and cultivate the same and in other respects comply with the public land laws of the United States relating to homesteads, so as to earn and procure title to said land.’

“3. That the said District Court erred in giving to the jury the following instruction, to wit:

“ ‘The Court further instructs you, that the said Bodkin, by virtue of the allowance on June 1st, 1912, at the United States Land Office, Los Angeles, California, of his application previously filed in said office, to wit, May 18th, 1910, to enter as a homestead the land described in said second count, acquired the right, by the Constitution and laws of the United States, to make settlement and residence upon said land and cultivate the same and in other respects comply with the public land laws of the United States relating to homesteads, so as to earn and procure title to said land.’

“4. That the said District Court erred in overruling the motion for a new trial and not allowing the same.

“5. That the said District Court erred in entering judgment and in pronouncing sentence against the defendants William B. Edwards and Robert L. Culpepper.

“HENRY M. WILLIS,

“J. O. PHILLIPS,

“Attorneys for Plaintiffs in Error. [82]

“We hereby certify that the foregoing assignment of errors are made on behalf of the petitioners for Writ of Error herein, and are in our opinion, well taken, and the same now constitute Assignment of Errors upon the writ prayed for.

“HENRY M. WILLIS,

“J. O. PHILLIPS,

“Attorneys for said Plaintiffs in Error.”

That concurrently therewith the defendants filed their petition for a writ of error, which petition for a writ of error was upon said date allowed by said Court. That the Court at the time of the issuing of said writ of error fixed a *supersedeas* bond upon appeal in the sum of three thousand dollars to be duly given by the defendant William B. Edwards, and a similar bond by the defendant Robert L. Culpepper. That thereupon the defendants and each of them duly gave and filed in the said court his said *supersedeas* bond in the sum of three thousand dollars, which was duly approved and allowed by the said Court. That thereupon on the said 18th day of May, 1914, a writ of error was duly issued in said cause, returnable before the United States Circuit Court of Appeals for the Ninth Circuit. That thereupon, upon said date, a citation on said writ of error was duly issued.

That thereupon the Court duly and regularly entered its orders in said cause allowing the said defendants further time within which to prepare, serve and file their bill of exceptions in said cause, and time within which to file the record on appeal in said cause with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

That upon the trial of said cause testimony was offered and received establishing the following facts:

That on the 17th day of July, 1902, the lands described in the indictment herein, among other lands, were public lands of the United States. [83]

That on the 17th day of July, 1902, the said lands described in the indictment, together with other lands in the neighborhood thereof, were duly withdrawn from public entry by order of the Land Department of the United States, under and by virtue of an Act of Congress, approved June 17, 1902, and commonly known as the Reclamation Act; said lands being then withdrawn under what was commonly called and known as "Second Form Withdrawal."

That thereafter, on September 12, 1903, the said lands described in the indictment, together with other lands in the neighborhood thereof, were duly withdrawn by order of the Land Department of the United States, under and by virtue of the said Act of June 17, 1902, and known and called the Reclamation Act, from all forms of entry, being withdrawn under what was and is commonly known and called the "First Form Withdrawal."

That prior to either of said withdrawals, the said land described in count number one of said indict-

ment, to wit, the southwest quarter of section 12, township 7 south, range 22 east, San Bernardino base and meridian, had been duly entered upon by one Danford Arnold, under the provisions of the Homestead Law of the United States.

That prior to the withdrawal of the said land described in count number two in said indictment, to wit, the northeast quarter of section 11, township 7 south, range 22 east, San Bernardino base and meridian, under the first form withdrawal as hereinbefore stated, entry had been duly made thereon by one William B. Edwards, defendant herein, under the Homestead Laws of the United States.

That while the said lands described in count number one of said indictment were still withdrawn from all forms of entry under the first form withdrawal above mentioned, one J. M. Ocheltree duly filed a contest in the Land Office of the United [84] States at Los Angeles, contesting the entry upon said land of the said Danford Arnold.

That hearing was duly had thereon in the said local land office and the said contest was thereupon duly forwarded to the Commissioner of the General Land Office at Washington, and by him decided in favor of the said Ocheltree on the 30th day of September, 1908, and on said day the said Commissioner duly cancelled the said entry of Danford Arnold and awarded to the said J. M. Ocheltree a preference right to make entry thereon under the laws of the United States.

That notice of the decision of said Commissioner was duly served upon the said J. M. Ocheltree on the

— day of October, 1908.

That while the said lands described in count number 2 of said indictment were still withdrawn from all forms of entry under the first form withdrawal above mentioned, one Patrick H. Bodkin duly filed a contest in the Land Office of the United States at Los Angeles, contesting the entry upon said land of the said William B. Edwards.

That hearing was duly had thereon in the said local land office, and the said contest was duly forwarded to the Commissioner of the General Land Office at Washington, and by him decided in favor of the said Patrick H. Bodkin, on the 25th day of June, 1909, the said Commissioner by his decision holding the said homestead entry of the said William B. Edwards for cancellation; and notice of said decision was duly given to the said Patrick H. Bodkin prior to the first day of January, 1910.

That thereafter the said William B. Edwards took an appeal from said decision to the Secretary of the Interior, and on the 19th day of April, 1910, the then Secretary of the Interior made an order cancelling the said homestead entry of said [85] William B. Edwards upon said lands, and awarded to the said Patrick H. Bodkin a preference right to enter upon said land.

That on the 10th day of January, 1910, by an order duly made and entered by the Land Department of the United States all of the said lands described in the indictment herein, among other lands, were restored to public settlement on April 18, 1910, and to public entry on May 18, 1910.

That on April 18, 1910, the said Robert L. Culpepper entered upon the said lands described in count number 1 of the indictment herein, and that said Robert L. Culpepper, up to and including the time of the alleged offense, and for some time thereafter, remained upon said lands.

That on May 18, 1910, said Robert L. Culpepper duly filed his application for a homestead upon said land in the local land office at Los Angeles, California.

That on the same day, to wit, May 18, 1910, said J. M. Ocheltree filed his application for a homestead upon said land described in count number one of the indictment herein, upon the basis and by virtue of the preference right theretofore granted him by the Land Department of the United States, as hereinbefore described.

That on April 18, 1910, the said William B. Edwards settled upon the said lands described in count number 2 of said indictment herein.

That on May 18, 1910, said William B. Edwards duly filed his application for a homestead upon said land described in count number 2 of the indictment herein.

That on May 18, 1910, one Patrick H. Bodkin filed his application to homestead said land described in count number 2 of the indictment herein, upon the basis and by virtue of the preference right granted him by the Land Department of the United States, as hereinbefore described. [86]

That prior to April 18, 1910, the said Robert L. Culpepper had settled upon and was residing on the

lands described in count number 1 of said indictment; that prior to April 18, 1910, the said William B. Edwards had settled upon and was residing on the lands described in count number 2 of said indictment, under and by virtue of a homestead entry duly filed in the local Land Office at Los Angeles on December 1st, 1902.

That on the 18th day of May, 1910, the said applications for homestead of said Culpepper, Ocheltree, Edwards and Bodkin, among others, were duly suspended by the Land Department of the United States, pending the settlement of a contest between the State of California and the United States Government as to the character and disposition of the said lands.

That on the 22d day of May, 1912, by an order duly made and entered the said lands were again restored to public entry.

That on June first, 1912, the homestead application of said William B. Edwards was cancelled by the Land Department of the United States, and the said Bodkin application was allowed, under and by virtue of his preference right heretofore described.

That on June 3, 1912, the said Culpepper application for homestead was cancelled by the Land Department of the United States, and the said Ocheltree application was allowed, under and by virtue of the preference right heretofore described.

That on the 6th day of November, 1912, the said J. M. Ocheltree attempted to make settlement and residence on the said lands described in count number 1 of said indictment under and by virtue of the

decision of the Land Department awarding him the said preference right, heretofore described, the said attempted settlement of said J. M. Ocheltree being within the six months period allowed by law for making settlement.

That on the 25th day of November, 1912, the said Patrick H. Bodkin attempted to make settlement and residence on the lands [87] described in count number 2 of said indictment, under and by virtue of the decision of the Land Department granting him a preference right, as heretofore described, the said attempted settlement of said Patrick H. Bodkin being within the six months period allowed by law for making settlement.

That during all the time after the filing of the application for homestead by the said J. M. Ocheltree and by the said Patrick H. Bodkin, respectively, the said Robert L. Culpepper and William B. Edwards, respectively, were contesting in the Land Department of the United States, by and through the regular means and rules of said department the right of the said Ocheltree and the said Bodkin, respectively, to perfect their homestead application upon the respective pieces of land as hereinbefore described; and that during all of the time after the said 18th day of May, 1910, up to the time of the filing of the indictment of this action, to wit, July 11, 1913, the said Edwards and the said Culpepper were maintaining their respective contentions for the right to perfect their homestead applications, respectively, in the Land Department of the United States, as hereinbefore described; and that during all of said time

the said Edwards and the said Culpepper actually maintained their residence, respectively, upon the respective pieces of land heretofore described, and upon which they had respectively filed their respective homestead applications.

The defendants William B. Edwards and Robert L. Culpepper hereby present the foregoing as their proposed bill of exceptions herein, and respectfully ask that the same may be allowed.

HENRY M. WILLIS,

J. O. PHILLIPS,

Attorneys for Said Defendants. [88]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. 655—CRIM.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILLIAM B. EDWARDS and ROBERT L. CULPEPPER et al.,

Defendants.

Stipulation [Re Engrossed Bill of Exceptions, etc.].

It is hereby stipulated by and between Albert Schoonover, United States Attorney for the Southern District of California, and Duke Stone, Assistant United States Attorney, attorneys for the plaintiff above named, and Henry M. Willis and J. O. Phillips, attorneys for the defendants William B.

Edwards and Robert L. Culpepper, above named, that the foregoing Engrossed Bill of Exceptions is a true and correct bill of exceptions in the above-entitled case, and that the same may be settled and allowed by the Court.

ALBERT SCHOONOVER,

United States Attorney.

DUKE STONE,

Assistant United States Attorney.

HENRY M. WILLIS,

J. O. PHILLIPS,

Attorneys for Said Defendants. [89]

The foregoing Bill of Exceptions having been duly presented to the Court, the same is hereby duly allowed and signed and made a part of the records in this case.

Dated this 15th day of October, 1914.

OLIN WELLBORN,

Judge. [90]

[Endorsed]: "No. 655—Crim. In the District Court of the United States, in and for the Southern District of California, Southern Division. United States of America, Plaintiff, vs. William B. Edwards and Robert L. Culpepper et al., Defendants. Engrossed Bill of Exceptions. (Original.) Filed Oct. 19, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Henry M. Willis, 412-413 Katz Block, San Bernardino, California, Attorneys at Law." [91]

*In the District Court of the United States, in and
for the Southern District of California, South-
ern Division.*

THE UNITED STATES OF AMERICA,
Plaintiffs,

vs.

WILLIAM B. EDWARDS, ROBERT L. CUL-
PEPPER et al.,

Defendants.

Assignment of Errors.

William B. Edwards and Robert L. Culpepper, the defendants, in the above-entitled cause, and plaintiffs in error herein, having petitioned for an order from said Court permitting them and each of them to procure a Writ of Error from this Court, directed from the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment and sentence made and entered in said cause against the said William B. Edwards and Robert L. Culpepper and each of them, plaintiffs in error, and petitioners herein, now make and file, and each of them now makes and files with their said petition the following assignments of errors herein, upon which they and each of them will rely for a reversal of said judgment and sentence upon said writ, and which said errors and each and every of them, are to the great detriment, injury and prejudice of the said defendants and each of them, and in violation of the rights conferred upon them and each of them by law; and

they and each of them says that in the record of proceedings in the above-entitled cause, upon the hearing and determination thereof, in the District Court of the United States for the Southern District of California, Southern Division, there is manifest error in this, to wit:

1. That the District Court erred in refusing to give the [92] following instruction requested by the said defendants, to wit:

“You are instructed that under the laws of the United States a right, called a preference right, is created and vested in the successful contestant of any homestead entry made and filed on any public land of the United States.

“You are further instructed that such preference right as created by law gives to such successful contestant the right, above all others, to enter the lands involved in the contest, within thirty days after notice of the cancellation of such former entry by the Commissioner of the General Land Office.

“You are further instructed that, if during the thirty days succeeding such notice the said lands have been and remain withdrawn from all forms of entry, the said preference right becomes extinct and is of no further force nor effect.

“You are further instructed that no rule, regulation nor decision of any of the officers of the Land Department of the United States can extend such right beyond the thirty days above stated, and that no ruling, action or decision of the Land Department or any of its officers, extending such right, or granting such right, can create or give the successful con-

testant any preferred right of entry or settlement on such land. And if you believe from the evidence in this case that Patrick H. Bodkin and James M. Ocheltree, respectively, secured a preference right as above described but did not exercise it within thirty days after notice of the cancellation by the Commissioner of the General Land Office of the contested entry, by filing an entry upon the land involved in such contests, respectively, then you are instructed that such preference right became extinct, and any ruling or decision, made thereafter, by any of the officers of the Land Department, based upon such preference right, was null and void and conferred no right upon said Bodkin or said Ocheltree which is embraced in, or protected by Section 19 of the Penal Code of the United States, [93] under which these defendants are indicted, and you must therefore acquit the defendants.”

2. That the said District Court erred in giving to the jury the following instruction, to wit:

“The Court further instructs you, that the said Ocheltree, by virtue of the allowance on June 1st, 1912, at the United States Land Office, Los Angeles, California, of his application previously filed in said office, to wit, May 18th, 1910, to enter as a homestead the land described in said first count, acquired the right, by the Constitution and laws of the United States, to make settlement and residence upon said land and cultivate the same and in other respects comply with the public land laws of the United States relating to homesteads, so as to earn and procure title to said land.”

3. That the said District Court erred in giving to the jury the following instruction, to wit:

“The Court further instructs you, that the said Bodkin, by virtue of the allowance on June 1st, 1912, at the United States Land Office, Los Angeles, California, of his application previously filed in said office, to wit, May 18th, 1910, to enter as a homestead the land described in said second count, acquired the right, by the Constitution and laws of the United States, to make settlement and residence upon said land and cultivate the same and in other respects comply with the public land laws of the United States relating to homesteads, so as to earn and procure title to said land.”

4. That the said District Court erred in overruling the motion for a new trial and not allowing the same. [94]

5. That the said District Court erred in entering judgment and in pronouncing sentence against the defendants William B. Edwards and Robert L. Culpepper.

HENRY M. WILLIS,

J. O. PHILLIPS,

Attorneys for Said Plaintiffs in Error.

We hereby certify that the foregoing Assignment of Errors are made on behalf of the petitioners for Writ of Error herein, and are in our opinion, well taken, and the same now constitute Assignment of Errors upon the writ prayed for.

HENRY M. WILLIS,

J. O. PHILLIPS,

Attorneys for Said Plaintiffs in Error. [95]

[Indorsed]: "No. 655—Crim. United States District Court, Southern District of California, Southern Division. The United States of America, Plaintiffs, vs. William B. Edwards, et al., Defendants. Assignment of Errors. Willis & Guthrie, 412-413 Katz Block, San Bernardino, California, Attorneys at Law." [96]

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

WILLIAM B. EDWARDS, ROBERT L. CUL-
PEPPER et als.,

Defendants.

Petition for Writ of Error.

Your petitioners, William B. Edwards and Robert L. Culpepper, defendants in the above-entitled cause, bring and each of them brings this, his petition for a writ of error, to the District Court of the United States, in and for the Southern District of California, Southern Division, and in that behalf your petitioners say and each of them says:

I.

On the 18th day of May, 1914, there was made, given, rendered and entered in the above-entitled court and cause a judgment against your petitioners and each of them wherein and whereby your petitioners were and each of them was adjudged and sen-

tenced to pay a fine of One Hundred Dollars and to four months imprisonment in the county jail of Riverside County, California, and your petitioners say and each of them says that he is advised by counsel and avers that there was and is manifest error in the records and proceedings had in such cause and in the making, giving, rendition and entry of such judgment and sentence, to the great injury and damage of your petitioners and each of them, all of which error will be more fully made to appear by an [97] examination of the said records and by an examination of the Bill of Exceptions to be hereafter by your petitioners entered and filed, and in the Assignment of Errors hereinafter set out; and to the end that the said judgment, sentence and proceedings may be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit your petitioners pray and each of them prays that a writ of error may be issued, directed therefrom, to the said District Court of the United States, for the Southern District of California, Southern Division, according to law and the practice of the court and that there may be directed to be returned pursuant thereto a true copy of the record, bill of exceptions, assignment of errors and all the proceedings heretofore had in said cause that the same may be removed into the United States Circuit Court of Appeals for the Ninth Circuit to the end that the error, if any has happened, may be duly corrected and full and speedy justice done your petitioners and each of them.

And your petitioners make and each of them now makes an Assignment of Errors, attached hereto,

upon which they and each of them will rely and which will be made to appear by a return of the said record in obedience to said writ.

WHEREFORE, your petitioners pray and each of them prays the issuance of a writ as herein prayed and that the Assignment of Errors annexed hereto may be considered their assignment of errors upon the writ and that the judgment rendered in this cause may be reversed and held for naught, and that said cause may be remanded for further proceedings, and that they and each of them be awarded a supersedeas upon said judgment and all necessary process, including bail.

WILLIAM B. EDWARDS,
ROBT. L. CULPEPPER,

Petitioners.

HENRY M. WILLIS,
J. O. PHILLIPS,

Attorneys for Defendants. [98]

[Indorsed]: “No. 655 — Crim. (Original.) United States District Court Southern District of California, Southern Division. The United States of America, Plaintiffs, vs. William B. Edwards, et al., Defendants. Petition for Writ of Error and Assignment of Errors (attached). Service of within Petition and Assignment of Errors by copies admitted this 18th day of May, 1914. ———, Asst. U. S. Attorney. Filed May 18, 1914. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy. Henry M. Willis, 412-413 Katz Block, San Bernardino, California, Attorneys at Law.” [99]

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

THE UNITED STATES OF AMERICA,
Plaintiffs,

vs.

WILLIAM B. EDWARDS, ROBERT L. CUL-
PEPPER, et al.,

Defendants.

**Order Allowing Writ of Error, Supersedeas and
Fixing Bail.**

Upon motion of Henry M. Willis, one of the attorneys for the defendants William B. Edwards and Robert L. Culpepper, and upon filing a petition for Writ of Error and Assignment of Errors, it is ordered that a Writ of Error be and hereby is allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the verdict and judgment heretofore entered herein. That pending decision upon said Writ of Error the Supersedeas prayed for by the defendants in their petition for Writ of Error herein is hereby allowed and the defendant William B. Edwards is admitted to bail upon said Writ of Error in the sum of Three Thousand Dollars and the defendant Robert L. Culpepper is admitted to bail upon said Writ of Error in the sum of Three Thousand Dollars.

OLIN WELLBORN,
Judge. [100]

[Indorsed]: "No. 655-Crim. (Original) United States District Court Southern District of California, Southern Division. The United States of America, Plaintiffs, vs. William B. Edwards, et al., Defendants. Order Allowing Writ of Error, Supersedeas and Fixing Bail. Filed May 18, 1914. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy. Henry M. Willis, 412-413 Katz Block, San Bernardino, California, Attorneys at Law." [101]

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

WILLIAM B. EDWARDS, ROBERT L. CUL-
PEPPER et al.,

Defendants.

Supersedeas Bond.

KNOW ALL MEN BY THESE PRESENTS:
That we, Robert L. Culpepper, of Riverside County,
California, principal, and James Walsh of Los An-
geles County, California, and Mary E. Shiffer of
Imperial County, California, as sureties are held and
firmly bound unto the United States of America, in
the full sum of Three Thousand Dollars, lawful
money of the United States, to be paid to the United
States of America, to which payment well and truly
to be made, we bind ourselves, our heirs, executors

and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 18th day of May, 1914.

Whereas, lately, at a term of the District Court of the United States for the Southern District of California, Southern Division, in a suit pending in the said court, between the United States of America, plaintiff, and William B. Edwards and Robert L. Culpepper, and others, defendants, a judgment and sentence was made, given, rendered and entered against the said Robert L. Culpepper and the said Robert L. Culpepper having obtained a Writ of Error from the United States Circuit Court of Appeals for the Ninth Circuit to reverse said judgment and sentence, and a citation directed to the United States of America to be and [102] appear in the said United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, pursuant to the terms and at the time fixed in said citation, which citation has been duly served;

Now, the condition of the above obligation is such that if the said Robert L. Culpepper shall appear either in person or by attorney, in the United States Circuit Court of Appeals for the Ninth Circuit, on such day or days as may be appointed for the hearing of said cause in said Court, and prosecute his said Writ of Error, and if the said Robert L. Culpepper shall abide by and obey all orders made by the United States Circuit Court of Appeals for the Ninth Circuit in said cause, and shall surrender himself in execution of such judgment and sentence, as said Court may direct, if the judgment and sentence

100 *William B. Edwards and Robert L. Culpepper*
against him shall be affirmed; and if he shall appear
for trial in the District Court of the United States
for the Southern District of California, Southern
Division, on such day or days as may be appointed
for the retrial by said District Court, and abide by
and obey all orders made by said Court, provided
the judgment and sentence against him shall be re-
versed by the United States Circuit Court of Ap-
peals for the Ninth Circuit, then the above obliga-
tion to be void; otherwise to remain in full force,
virtue and effect.

ROBERT L. CULPEPPER.

JAMES WALSH.

MARY E. SHIFFER. [103]

State of California,
County of Los Angeles,—ss.

JAMES WALSH and MARY E. SHIFFER,
being duly sworn, each for himself and not for the
other, says that he is a resident and a freeholder in
the Southern District of California, Southern Divi-
sion, and is worth in property situated therein the
sum of Three Thousand Dollars over and above all
his just debts and liabilities, exclusive of property
exempt from execution.

JAMES WALSH.

MARY E. SHIFFER.

Subscribed and sworn to before me this 18th day
of May, 1914.

[Seal]

CHAS. N. WILLIAMS,
U. S. Commissioner.

Form of bond and sufficiency of sureties approved.

DUKE STONE,
Asst. United States Attorney.

The within bond accepted and approved this ——
day of May, 1914.

OLIN WELLBORN,
District Judge. [104]

[Indorsed]: “No. 655—Crim. United States District Court, Southern District of California, Southern Division. The United States of America, Plaintiffs, vs. William B. Edwards et al., Defendants. Supersedeas Bond of Robert L. Culpepper. Filed May 18, 1914. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. Henry M. Willis 412–413 Katz Block, San Bernardino, California, Attorneys at Law. [105]

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

THE UNITED STATES OF AMERICA,
Plaintiffs,

vs.

WILLIAM B. EDWARDS, ROBERT L. CUL-
PEPPER et al.,

Defendants.

Supersedeas Bond.

KNOW ALL MEN BY THESE PRESENTS:
That we, William B. Edwards, of Riverside County, California, principal, and A. R. Bowen of San Bernardino County, California, and Clara I. Bowen of San Bernardino County, California, as sureties are held and firmly bound unto the United States

102 *William B. Edwards and Robert L. Culpepper*
of America, in the full sum of Three Thousand Dollars, lawful money of the United States, to be paid to the United States of America, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 18th day of May, 1914.

Whereas, lately at a term of the District Court of the United States for the Southern District of California, Southern Division, in a suit pending in the said court, between the United States of America, plaintiff, and William B. Edwards and Robert L. Culpepper, and others, defendants, a judgment and sentence was made, given, rendered and entered against the said William B. Edwards and the said William B. Edwards having obtained a Writ of Error from the United States Circuit Court of Appeals for the Ninth Circuit to reverse said judgment and sentence, and a citation directed to the United States of America to be and appear in [106] the said United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, pursuant to the terms and at the time fixed in said citation, which citation has been duly served;

Now, the condition of the above obligation is such that if the said William B. Edwards shall appear either in person or by attorney, in the United States Circuit Court of Appeals for the Ninth Circuit, on such day or days as may be appointed for the hearing of said cause in said Court, and prosecute his said Writ of Error, and if the said William B.

Edwards shall abide by and obey all orders made by the United States Circuit Court of Appeals for the Ninth Circuit in said cause, and shall surrender himself in execution of such judgment and sentence, as said Court may direct, if the judgment and sentence against him shall be affirmed; and if he shall appear for trial in the District Court of the United States for the Southern District of California, Southern Division, on such day or days as may be appointed for the retrial by said District Court, and abide by and obey all orders made by said Court, provided the judgment and sentence against him shall be reversed by the United States Circuit Court of Appeals for the Ninth Circuit, then the above obligation to be void; otherwise to remain in full force, virtue and effect.

WILLIAM B. EDWARDS.

A. R. BOWEN.

CLARA I. BOWEN. [107]

State of California,
County of Los Angeles,—ss.

A. R. BOWEN and CLARA I BOWEN, being duly sworn, each for himself and not for the other, says that he is a resident and a freeholder in the Southern District of California, Southern Division, and is worth in property situated therein the sum of Three Thousand Dollars over and above all his just debts and liabilities, exclusive of property exempt from execution.

A. R. BOWEN.

CLARA I. BOWEN.

Subscribed and sworn to before me this 18th day of May, 1914.

[Seal]

CHAS. N. WILLIAMS,

Form of bond and sufficiency of sureties approved.

DUKE STONE,

Asst. United States Attorney.

The within bond accepted and approved this _____ day of May, 1914.

OLIN WELLBORN,

District Judge. [108]

[Indorsed]: "No. 655—Crim. United States District Court, Southern District of California, Southern Division. The United States of America, Plaintiffs, vs. William B. Edwards et al., Defendants. Supersedeas Bond of Wm. B. Edwards. Filed May 18, 1914. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. Henry M. Willis, 412-413 Katz Block, San Bernardino, California, Attorneys at Law." [109]

UNITED STATES OF AMERICA.

District Court of the United States, Southern District of California, Southern Division.

CLERK'S OFFICE.

No. 655—CRIM.

UNITED STATES OF AMERICA

vs.

WM. B. EDWARDS et al.

Praeceptum [for Transcript of Record].

To the Clerk of Said Court:

Sir: Please issue under the hand of the Clerk and the seal of the Court copies of the following papers, the same to constitute the record in the above-entitled cause on Writ of Error to the U. S. Circuit Court of Appeals for the Ninth Circuit, viz.:

Indictment;

Arraignment and Pleas;

Minutes of Trial;

Verdict;

All orders continuing cause, motion for new trial, order denying motion, Sentence and Judgment;

Clerk's Certificate to Judgment-roll;

Petition for Writ of Error;

Assignment of Errors;

Order Allowing Writ of Error;

Supersedeas Bond of Robert L. Culpepper;

Supersedeas Bond of Wm. B. Edwards;

All orders fixing or extending time to prepare Bill of Exceptions;

Bill of Exceptions on behalf of defendants Wm. B. Edwards and Robt. L. Culpepper;

Order Allowing Bill of Exceptions, etc.; [110]

Writ of Error;

Citation on Writ of Error;

Answer to Writ of Error;

Clerk's Certificate to Transcript.

HENRY M. WILLIS,
Attorney for Defendants.

[Endorsed]: "No. 655—Crim. U. S. District Court, Southern District of California, Southern Division. United States of America vs. Wm. B. Edwards et al. Praecipe for Papers in the Case on Writ of Error to U. S. Circuit Court of Appeals. Filed Nov. 13, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk." [111]

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

No. 655—CRIM.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

WILLIAM B. EDWARDS, ROBERT L. CUL-
PEPPER et al.,

Defendants.

**Certificate of Clerk U. S. District Court to Trans-
cript of Record.**

I, Wm. M. Van Dyke, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing one hundred and eleven (111) type-written pages, numbered from 1 to 111 inclusive, and comprised in one (1) volume, to be a full, true and correct copy of the Indictment, Pleas of Defendants, Minutes of Trial, Verdict, Order Denying Motion for New Trial, and Judgment of the Court, Clerk's Certificate to Judgment-roll, Orders Continuing Cause for Trial, Motion for New Trial, Order

Extending Time to Prepare and File Bill of Exceptions, Order Fixing Time to Prepare and File Bill of Exceptions, Bill of Exceptions, Assignment of Errors, Petition for Writ of Error, Order Allowing Writ of Error, Supersedeas Bond of Defendant Robert L. Culpepper, Supersedeas Bond of Defendant William B. Edwards, and Praecipe for Transcript in the above and therein entitled cause; and I do further certify that the above constitutes the record in said cause as specified in the said Praecipe filed in my office on behalf of the plaintiffs in error by their attorneys of record.

I do further certify that the cost of the foregoing [112] record is \$53 95/100, the amount whereof has been paid me by William B. Edwards and Robert L. Culpepper, the plaintiffs in error in said cause.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this 9th day of January, in the year of our Lord, one thousand nine hundred and fifteen, and of our Independence, the one hundred and thirty-ninth.

[Seal]

WM. M. VAN DYKE,

Clerk of the District Court of the United States of America, in and for the Southern District of California.

[Ten Cents Internal Revenue Stamp. Canceled January 9, 1915. Wm. M. V. D.] [113]

[Endorsed]: No. 2568. United States Circuit Court of Appeals for the Ninth Circuit. William B. Edwards and Robert L. Culpepper, Plaintiffs in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Southern District of California, Southern Division.

Received January 13, 1915.

F. D. MONCKTON,
Clerk.

Filed February 8, 1915.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals,
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

**[Order Enlarging Time to Docket Cause and File
Record to August 1, 1914.]**

*In the United States Circuit Court of Appeals, Ninth
Judicial Circuit.*

WILLIAM B. EDWARDS et al.,
Plaintiffs in Error,
vs.

THE UNITED STATES OF AMERICA,
Defendants in Error.

Good cause appearing therefor, it is hereby ordered, that the time heretofore allowed said plaintiffs in error to docket said cause and file the record thereof, with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, be and the

same is hereby enlarged and extended to and including the 1st day of August, 1914.

Los Angeles, May 27th, 1914.

OLIN WELLBORN,
United States District Judge, Southern District of
California.

[Endorsed]: No. — United States Circuit Court of Appeals, for the Ninth Circuit. William B. Edwards et al., Plaintiffs in Error, vs. The United States of America, Defendants in Error. Order Enlarging Time to File Record, etc. Filed Jun. 2, 1914. F. D. Monckton, Clerk.

**[Order Enlarging Time to Docket Cause and File
Record to October 1, 1914.]**

*In the United States Circuit Court of Appeals, Ninth
Judicial Circuit.*

WILLIAM B. EDWARDS et al.,
Plaintiffs in Error,
vs.

THE UNITED STATES OF AMERICA,
Defendants in Error.

Good cause appearing therefor, it is hereby ordered, that the time heretofore allowed said plaintiffs in error to docket said cause and file the record thereof, with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, be and the same is hereby enlarged and extended to and includ-

ing the 1st day of October, 1914.

Los Angeles, July 28th, 1914.

OLIN WELLBORN,

United States District Judge, for the Southern District of California.

[Endorsed]: No. — United States Circuit Court of Appeals, for the Ninth Circuit. William B. Edwards et al., Plaintiffs in Error, vs. The United States of America, Defendants in Error. Order Enlarging Time to Docket Cause and File Record. Filed Jul. 30, 1914. F. D. Monckton, Clerk.

[Order Enlarging Time to Docket Cause and File Record to December 1, 1914.]

In the United States Circuit Court of Appeals, Ninth Judicial Circuit.

WILLIAM B. EDWARDS et al.,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendants in Error.

Good cause appearing therefor, it is hereby ordered, that the time heretofore allowed said plaintiffs in error to docket said cause and file the record thereof, with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, be and the same is hereby enlarged and extended to and including the 1st day of December, 1914.

Dated at Los Angeles, September 28th, 1914.

OLIN WELLBORN,
United States District Judge, Southern District of
California.

[Endorsed]: No. — United States Circuit Court of Appeals, for the Ninth Circuit. William B. Edwards et al., Plaintiffs in Error, vs The United States of America, Defendants in Error. Order Enlarging Time to Docket Cause and File Record. Filed Sep. 30, 1914. F. D. Monckton, Clerk.

**[Order Extending Time to Docket Cause and File
Record to January 1, 1915.]**

*In the United States Circuit Court of Appeals, Ninth
Judicial Circuit.*

WILLIAM B. EDWARDS et al.,
Plaintiffs in Error,
vs.

THE UNITED STATES OF AMERICA,
Defendants in Error.

Good cause appearing therefor, it is hereby ordered, that the time heretofore allowed said plaintiffs in error to docket said cause and file the record thereof, with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, be and the same is hereby enlarged and extended to and including the 1st day of January, 1915.

Dated at Los Angeles, November 30th, 1914.

OLIN WELLBORN,
United States District Judge, for the Southern Dis-
trict of California.

[Endorsed]: No. — United States Circuit Court of Appeals, for the Ninth Circuit. William B. Edwards et al., Plaintiffs in Error, vs. The United States of America, Defendants in Error. Order Extending Time to Docket Cause and File Record. Filed Dec. 2, 1914. F. D. Monckton, Clerk.

[Order Extending Time to File Record and Docket Cause to February 1, 1915.]

In the United States Circuit Court of Appeals, Ninth Judicial Circuit.

WILLIAM B. EDWARDS et al.,
Plaintiffs in Error,
vs.

THE UNITED STATES OF AMERICA,
Defendants in Error.

Good cause appearing therefor, it is hereby ordered, that the time heretofore allowed said plaintiffs in error to docket said cause and file the record thereof, with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, be, and the same is hereby enlarged and extended to and including the 1st day of February, 1915.

Dated at Los Angeles, December 28th, 1914.

OLIN WELLBORN,
United States District Judge, for the Southern District of California.

[Endorsed]: No. — United States Circuit Court of Appeals, for the Ninth Circuit. Wm. B. Edwards et al., Plaintiffs in Error, vs. The United States of America, Defendants in Error. Order Extending Time to File Record. Filed Dec. 29, 1914. F. D. Monckton, Clerk.

No. 2568. United States Circuit Court of Appeals, for the Ninth Circuit. Orders Under Rule 16 Enlarging to File Record Thereof and to Docket Case. Re-filed Feb. 8, 1915. F. D. Monckton, Clerk.



No. 2568.

UNITED STATES

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

WILLIAM B. EDWARDS, ROBERT L. CULPEPPER,	}	Plaintiffs in Error,
		vs.
THE UNITED STATES OF AMERICA,	}	Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

HENRY M. WILLIS,
J. O. PHILLIPS,
Attorneys for Plaintiffs in Error.

Filed

APR 15 1910

No. 2568.

UNITED STATES

Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

WILLIAM B. EDWARDS, ROBERT L. CULPEPPER,	}
Plaintiffs in Error,	
vs.	
THE UNITED STATES OF AMERICA,	}
Defendant in Error.	

OPENING BRIEF OF PLAINTIFFS IN ERROR.

I. Statement of the Case.

This cause comes to the Circuit Court of Appeals on Writ of Error to the District Court of the United States, in and for the Southern District of California, Southern Division. It is based upon an assignment of errors (Tr., pp. 90-93), and a bill of exceptions (tr., pp. 68-88), and the errors assigned and herein relied upon consist in the refusal of the District Court to give a certain instruction (tr., pp. 91-92), and in giving two certain instructions (tr., pp. 92-93), and in overruling motion for new trial (tr., p. 93), and in entering judgment and pronouncing sentence against plaintiffs in error. (Tr., p. 93.)

There is but one question involved on the writ of error, and that is purely one of law raised by the specifications of error herein, wherein error in refusing an instruction requested by plaintiffs in error, and in the giving of certain others by the District Court is claimed.

The question raised, briefly stated is:

Is the action of local land officials in permitting and receiving the filing of a homestead application, based solely upon a preference right of entry, theretofore awarded to the applicant by the land department at the successful termination of a contest of an entry upon lands, while withdrawn from all form of public entry under the reclamation act, and the allowance by the local land officials of such homestead entry upon such preference right, long after the thirty day notice required by law, but after the restoration of said lands to entry, within the jurisdiction of the land officials, and does such action confer such a right as is embraced within the terms of section 19 of the Penal Code of the United States?

Such is the question herein roughly stated. It will develop and appear with perfect clearness only after a consideration of the facts as embodied in the bill of exceptions herein, and the law relative to the subject embracing the question.

II. Specification of Errors.

Plaintiffs in error herein specify the following errors, relied upon and herein asserted and urged:

1st. Error of the District Court in refusing to give

the following instruction requested by plaintiffs in error: (Tr., pp. 51-2, 91.)

“You are instructed that under the laws of the United States a right, called a preference right, is created and vested in the successful contestant of any homestead entry made and filed on any public land of the United States.

“You are further instructed that such preference right as created by law gives to such successful contestant the right, above all others, to enter the lands involved in the contest, within thirty days after notice of of the cancellation of such former entry by the commissioner of the general land office.

“You are further instructed that, if during the thirty days succeeding such notice the said land have been and remain withdrawn from all forms of entry, the said preference right becomes extinct and is of no further force nor effect.

“You are further instructed that no rule, regulation nor decision of any of the officers of the land department of the United States can extend such right beyond the thirty days above stated, and that no ruling, action or decision of the land department or any of its officers, extending such right or granting such right, can create or give the successful contestant any preferred right of entry or settlement on such land. And if you believe from the evidence in this case that Patrick H. Bodkin and James M. Ocheltree, respectively, secured a preference right as above described but did not exercise it within thirty days after notice of the cancellation by

the Commissioner of the General Land Office of the contested entry, by filing an entry upon the land involved in such contests. respectively, then you are instructed that such preference right became extinct, and any ruling or decision, made thereafter, by any of the officers of the land department, based upon such preferred right, was null and void and conferred no right upon said Bodkin or said Ocheltree which is embraced in, or protected by section 19 of the Penal Code of the United States, under which these defendants are are indicted, and you must theretorefore acquit tthe defendants.”

2nd. Errors of the District Court in giving the following isstructions: (Tr., pp. 50, 92.)

“The Court further instructs you, that the said Ocheltree, by virtue of the allowance on June 1st, 1912, at the United States Land Office, Los Angeles, California, of his application previously filed in said office, to-wit: May 18th, 1910, to enter as a homestead the land described in said first count, acquired the right, by the constitution and laws of the United States, to make settlement and residence upon said land and cultivate the same, and in other respects comply with the public land laws of the United States relating to homesteads, so as to earn and procure title to said land.”

3rd. Error of the District Court in giving the following instructions: (Tr., pp. 51, 93.)

“The Court further instructs you, that the said Bodkin, by virtue of the allowance on June 1st, 1912, at the United States Land Office, Los Angeles, California,

of the application previously filed in said office, to-wit: May 18th, 1910, to enter as a homestead the land described in said second count, acquired the right, by the constitution and laws of the United States, to make settlement and residence upon said land and cultivate the same and in other respects comply with the public land laws of the United States, relating to homesteads, so as to earn and procure title to the said lands.”

4th. Error of the District Court in overruling the motion for a new trial and not allowing the same. (Tr., p. 93.)

5th. Error of the District Court in entering judgment and in pronouncing sentence against the defendants, William B. Edwards and Robert L. Culpepper. (Tr., p. 93.)

III. The Indictment. (Tr., pp. 5, 18.)

Plaintiffs in error, with four others, were indicted by the grand jury of the United States within and for the Southern Division of the Southern District of California, on July 11th, 1913, for conspiracy to injure, oppress, threaten and intimidate two citizens of the United States, namely: one James M. Ocheltree and one Patrick H. Bodkin, in the free exercise of a right and privilege secured to them by the constitution and laws of the United States, to-wit: the right to make and perfect certain homestead entries on two quarter sections of land in the Palo Verde Valley, Riverside County, California. The indictment is found under

section 19 of the Penal Code of the United States, approved in 1910, and contains two counts.

First Count. (Tr., pp. 5-12.)

Briefly stated, the first count alleges that the plaintiffs in error and four others conspired to deprive one James M. Ocheltree of a right to make settlement and residence upon a certain quarter section of land, described therein, by threats and force. The indictment alleges that on May 18th, 1910, said Ocheltree was in all respects qualified to take and enter public land of the United States, and especially to make and perfect the homestead entry thereafter mentioned; that on May 18th, 1910, said Ocheltree made and filed in the land office at Los Angeles, his application and declaration under oath, to enter as a homestead a certain quarter section of land, therein described; that thereafter, on June 1st, 1912, declaration was duly and regularly allowed by the Register and Receiver, and said Ocheltree was allowed to, and did enter as a homestead the said tract of land; that ever since said Ocheltree has been and now is the owner of and entitled to the exercise and possession of all rights flowing from said homestead application and entry, including the right to make settlement and residence upon said tract of land, and to live and reside upon the same, and to cultivate and improve the same in the manner required by the public land laws of the United States relating to homesteads; that on November 6th, 1912, said Ocheltree attempted to make settlement and residence on the

said lands and that plaintiffs in error and others conspired, combined, confederated and agreed together to prevent said Ocheltree from so doing. This count then proceeds to set forth overt acts of the accused, but it is unnecessary to review them here.

Second Count. (Tr., pp. 12-18.)

The second count is almost precisely the same in form and language as the first, with only the difference of name, the description of the quarter section, and the overt acts.

Briefly it alleges that one Patrick H. Bodkin was on May 18th, 1910, qualified to take and enter public lands of the United States and especially to make and perfect the homestead entry described in the indictment; that on May 18th, 1910, said Bodkin made and filed in the land office at Los Angeles, his application to enter as a homestead a quarter section of land therein described; and that on June 1st, 1912, said application was duly allowed by the Register and Receiver, and said Bodkin was allowed to, and did enter as a homestead, the said tract of land; that on November 25th, 1912, said Bodkin attempted to make settlement and residence on said land, but that plaintiffs in error and others conspired to injure, oppress, threaten and intimidate said Bodkin in the free exercise of the right to make settlement on said land and to cultivate and improve the same as required by the public land laws relating to homesteads. This count then proceeds to outline the conspiracy and

to set forth overt acts committed to carry out its purposes.

Upon this indictment the trial proceeded, occupying nearly three weeks, and resulting in a verdict of guilty as to the two plaintiffs in error, not guilty as to three, and a disagreement as to one.

Plaintiffs in error thereafter duly moved for a new trial (Tr., p. 63-4,) which was denied (Tr., p. 59,) and exception duly taken and noted (Tr., p. 59,) and the judgment of the court was thereupon pronounced (Tr., pp. 59-60.)

IV. Statement of Facts.

Upon the trial the undisputed facts, relating to the two quarter sections described in the indictment, and the alleged rights of Ocheltree and Bodkin to make homestead entry thereon respectively, were shown in evidence as set forth herein by the bill of exceptions (Tr., pp. 68-88.)

From that it appears that from September 12, 1903, until May 18, 1910, the lands described in the indictment, and to which the alleged preference rights of homestead refer, were withdrawn from all forms of public entry, under and by virtue of the Act of June 17, 1902, commonly called the Reclamation Act, said lands, during that period, having been withdrawn under what is commonly called "First Form Withdrawal."

It also appears that while said lands were so withdrawn, said Ocheltree contested the entry upon the quarter section described in the first count, theretofore made by one Danford Arnold, and that the land depart-

ment allowed such contest to proceed, and on September 30, 1908, the Arnold entry was canceled, and a preference right awarded by the land department to said Ocheltree, to enter thereon under the homestead laws, and that notice of this preference right was duly served on Ocheltree in October, 1908, while said lands were still withdrawn.

It also appears that while said lands were so withdrawn said Bodkin contested the homestead entry on the quarter section, described in the second count, theretofore made by one Edwards, who is plaintiff in error herein; that the land department allowed such contest to proceed, and on June 25th, 1909, the commissioner of the general land office canceled the Edwards entry and awarded to Bodkin a preference right to enter said quarter section as a homestead; and that Bodkin was duly notified of such cancellation prior to January 1st, 1910, while said lands were still withdrawn.

That on January 10, 1910, an order was made by the Land Department restoring the lands described in the indictment, with other lands, to public settlement on April 18, 1910, and to public entry on May 18th, 1910.

Thereafter on April 18, 1910, Robert L. Culpepper, plaintiff in error herein, settled on the quarter section described in the first count, and on May 18, 1910, filed his application for a homestead thereon. But on the same day, to-wit: May 18, 1910, said Ochiltree filed his application for a homestead thereon, upon the basis and by virtue of the preference right theretofore granted him by the land department on September 30, 1908.

Also on April 18, 1910, William B. Edwards, plaintiff in error herein, settled on the quarter section described in the second count, and on May 18, 1910, filed his application for a homestead thereon. But on the same day, to-wit: May 18, 1910, said Bodkin filed his application for a homestead thereon, upon the basis and by virtue of the preference right theretofore granted him by the land department on June 25th, 1909.

All these applications were then suspended, pending a contest between the State of California and the United States as to the character of the lands, but on May 22, 1912, were again restored to public entry.

Thereupon, to-wit: on June 1, 1912, the local land officials canceled the Edwards entry and allowed the Bodkin entry solely by virtue of the so-called preference right theretofore awarded to Bodkin on June 25, 1909; and on June 3, 1912, canceled the Culpepper application and allowed the Ocheltree application solely by virtue of the preference right awarded Ocheltree on September 30, 1908.

It further appears from the facts proven that both Culpepper and Edwards had made settlement on the quarter sections, respectively, on April 18th, 1910, pursuant to the order of restoration, and we believe we are justified in claiming that they thereby gained a settler's preference right, respectively,—of which more hereafter,—but that the officers of the land department assumed that the so-called reference rights awarded by them to Ocheltree and Bodkin, respectively, were vested,

and paramount to the rights of all others including settlers, and this brings us to the real question in this case.

V. The Question Herein.

Can the Land Department, by awarding a preference right of entry to the successful contestant of an entry on lands, while withdrawn under the first form withdrawal of the Reclamation Act, and by recognizing such preference right as paramount to all others within thirty days after notice of restoration of such lands to public entry, although not exercised within thirty days after notice of such preference right, create, or confer a right on such successful contestant as is contemplated by, or included in, Section 19 of the United States Penal Code?

Or, to put it in another form: Has the Land Department authority and jurisdiction to suspend the preference right, as defined and created by the Act of May 14, 1880, when awarded at the successful termination of a contest of an entry on lands withdrawn from all forms of public entry, and while said lands are so withdrawn, so as to keep such preference right alive beyond the thirty days' notice of the cancellation of the entry, given by the local land officials, as required by said Act?

To each of these questions, plaintiffs in error say that "no" is the correct answer, and to persuade this honorable court that such is the correct answer, we will now proceed to consult law, logic and reason.

VI. Argument.

Section 19 the Penal Code, of the United States of 1910, under which the indictment herein is found, pro-

vides that “if two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of *any right or privileges secured to him by the constitution or laws of the United States*, (italics ours,)” they shall be punished, etc.

In discussing this section which was formerly Section 5508 of the Revised Statutes, the Supreme Court of the United States in *United States vs. Cruikshank*, 92 U. S., 542, said:

“To bring this case under the operation of the statute therefore, it must appear that the right, the enjoyment of which the conspirators intended to hinder or prevent, was one granted or secured by the constitution or laws of the United States. If it does not so appear, the criminal matter charged has not been made indictable by any Act of Congress.”

And again in *United States vs. Waddell*, 112 U. S., 76, the same court announced:

“The protection of this section extends to no other right, to no right or privilege dependent on a law or laws of the State. Its object is to guaranty safety and protection to persons in the exercise of *rights dependent on the laws of the United States, including, of course, the constitution and treaties, as well as statutes*, and it does not in this section at least, design to protect any other rights. The right assailed, obstructed, and its exercise prevented as set out in this petition, is very clearly a right wholly dependent upon the Act of Congress concerning the settlement and sale of public lands of the United States. No such right ex-

ists or can exist outside of an Act of Congress.” (Italics ours.)

The Act Creating Preference Right.

By the Act of May 14, 1880, (21 Stat., 140,) Congress created the preference right known to our lands laws as follows:

“Sec. 2. In all cases where any person has contested, paid the land office fees, and procured the cancellation of any pre-emption, homestead, or timber culture entry, he shall be notified by the register of the land office of the district in which such land is situated of such cancellation and *shall be allowed thirty days from date of such notice to enter said lands.*” (Italics ours.)

Thus we see that in creating this preference right Congress expressly limited its existence to a period of thirty days from notice by the local land officer, nor is there any other Act of Congress which affects or modifies this limitation so as to prolong or extend its existence beyond the thirty days prescribed.

Discussing the preference right, the Supreme Court of Oklahoma in the case of Reaves vs. Oliver, 41 Pac., 353, says:

“A contestant for a preference right, has no right, under the law to occupy the land, as against the entryman, but when the entry is canceled, as a result of his contest and the preference right is awarded under the Act of Congress of May 14, 1880, his rights relate back to the initiation of his contest and no settlement made

on the land or contest initiated subsequent to the initiation of his contest can defeat his right to enter the land, or take from him the right to possession, *if he follows up his right and make the homestead entry within the time allowed by law.*'' (Italics ours.)

In the case at bar, neither Ocheltree nor Bodkin, exercised their alleged preference rights within thirty days after notice of such by the land office, for the apparent reason that they could not do so, the lands involved being withdrawn from all forms of public entry. But the Land Department assumed to keep such rights alive beyond the period of thirty days, and allowed to each of the successful contestants the right to enter the lands described as against all other persons, within thirty days after the lands were restored to public entry, and made the allowance of their applications, respectively, solely by virtue of the so-called preference right.

The allowance by the land office of the applications of Ocheltree and Bodkin, based on preference rights theretofore awarded, could give them no more rights than the preference right itself embraced or was imbued with, and if the preference right, when sought to be exercised, was defunct, or void, or had expired by limitation of the statute creating it, then the action of the Land Department was void, and no right was acquired by Ocheltree or Bodkin by virtue of the allowance of the application based thereon.

In support of this contention, we call this honorable court's attention to the language of the Supreme Court in *Maddox vs. Burnham*, 156 U. S., 544, where it says:

“It is true that he claims that he had permission from the register of the land office to go upon the land and occupy it, but the register had no power to give such permission; he had no general control over the unappropriated public lands; *he could vest no rights, legal or equitable, in any individual other than such as are authorized by statute.*” (Italics ours.)

That there is no statute nor other authority for the action of the local land office in allowing the applications of Ocheltree and Bodkin on June 1, 1912, because and by virtue of their alleged preference rights, months and almost years after the statutory thirty days had expired, is amply shown by the decisions, rules, regulations and instructions of the General Land Office up to and after the allowance of said applications on June 1, 1912, hereinafter set out.

And Congress itself has made a distinction which amounts almost to construction as to the life of these preference rights as affected by withdrawals under authority of acts of Congress by the enactment of the act of March 3, 1911, wherein section 2 reads as follows:

“Sec. 2. That in all cases where contests were initiated under the provisions of the act of May 14, 1880, prior to the withdrawals of the lands for national forest purposes, the qualified successful contestants may exercise their preference right to enter the land within six months after the passage of this act.” (36 Stat. 1084.)

Here we see Congress deliberately saving and protecting and extending the preference right of successful contestants over entries on lands withdrawn for national

forest purposes, but no where except in the decisions of the land department, hereinafter cited and reviewed, can we find any such change or modification of the preference right awarded to successful contestants over entries on lands withdrawn under the first form withdrawal provided for in the reclamation act.

Two years before the passage of this act of Congress, the general land office rendered, on February 17, 1909, this decision:

“The act of May 14, 1880, does not confer upon a successful contestant *a vested* right to enter the land, but merely a preferred right of entry for thirty days as against everyone except the United States.

“Where after the cancellation of an entry as the result of a contest, but prior to exercise by the contestant of his preferred right, the land is withdrawn for inclusion within a national forest the contestant’s *preference right is thereby defeated.*” (Italics ours.)

Case of David A. Cameron, 37 L. D., 450.

And long before, on December 11, 1894, Secretary of the Interior Smith, wrote this opinion for the general land office:

“The application of Davis was rejected by the local office because ‘the land is shown by our records to be part of the “Sierra Forest Reserve,” as defined by the proclamation of the president, transmitted to this office by the honorable commissioner’s letter “P” of March 21, 1893.’ From this rejection Davis appealed, claiming that he had a preference right of entry of said lands because he was a successful contestant of one Bacon,

whose entry was held for cancellation by departmental decision of March 13, 1893, and his rights were preserved by the President's proclamation making said forest reserve. * * * *

"The land applied for was included within the reservation referred to, and said reservation took the same beyond the operation of the land laws, and being by authority of law and not containing a provision excepting the right of successful contestants from the force and effect of the reservation, *it destroyed any privilege which the applicant might otherwise have had, had said reservation not been made.*" (Italics ours.)

Case of Jefferson E. Davis, 19 L. D., 489.

And again on May 9, 1900, the following opinion was written by Secretary of the Interior Hitchcock:

"Whatever preferred right a contestant may have on the cancellation of the entry under attack, *is defeated by an intervening proclamation* by the President declaring the establishment of a forest reservation that includes the land embraced within the contested entry." (Italics ours.)

Case of Schmith, 30 L. D., 6.

Also on March 27, 1911, Assistant Secretary of the Interior Pierce, in construing section 2 of the act of March 3, 1911, just enacted, and relating to preference rights of successful contestants as affected by forest reserve withdrawals, rendered the following decision:

"This case is in the same condition in respect to this as it would be had Titus sought to make homestead entry. He could not make such entry because the land

was segregated under the homestead entries against which his contests were then still pending. *It is well settled under then subsisting law that reservation of land to public use defeats the preference right of a contestant*" (Italics ours.)

Case of Santa Fe Pacific R. R. Co., 39 L. D., 611.

On February 25th, 1904, Secretary of the Interior Hitchcock wrote the following decision:

"The rule is so settled as to need no citation of authority that the contestant's preference right is personal and cannot be assigned or waived in favor of another, but that on failure of the contestant to exercise his preference right within the time limited, the entry of the first legal applicant must be allowed."

Schilling vs. Fuller, 32 L. D., 466.

And again on January 18, 1910, First Assistant Secretary of the Interior Pierce, wrote this decision:

"January 6, 1908, Ness was notified of his preference right of entry by registered mail and he received this notice on January 8, 1908, as shown by his signature to the registry return receipt. *His preference right of thirty days therefore commenced to run on January 9,* (the day he received the notice being excluded.) *His preference right expired February 7, 1908.*" (Italics ours.)

Finley vs. Ness, 38 L. D., 394.

Shortly after the passage of the act of May 14, 1880, to-wit: on August 31, 1886, the land department rendered this decision:

“Failure to assert the preference right of entry within the statutory period after cancellation deprives the successful contestant of all rights gained by the contest.” (Italics ours.)

Hollants vs. Sullivan, 5 L. D., 115.

In a decision rendered December 28th, 1895, the general land office announced:

“But the law requiring a successful contestant to complete his entry within thirty days from date of notice of cancellation, and that notice to an authorized attorney of record is notice to the party he represents, is too well established to call for discussion. There is no question that Gariss failed to perfect his homestead entry within thirty days from date of notice of cancellation. Hence any rights that he may have must depend on his ability to show that he was an actual settler in good faith at the date of Borin’s entry.” (Italics ours.)

Gariss vs. Borin, 21 L. D., 542.

We have heretofore chiefly dwelt upon the law concerning preference rights and the decisions concerning the same, without reference to the Reclamation Act of June 17th, 1902, but as that Act seriously affected such rights and intimately concerns this case, we now will endeavor to assist the court in comprehending the changes caused by that Act and by the withdrawals thereunder.

The Reclamation Act. (32 Stat., 388.)

On June 17, 1902, Congress passed the Act commonly called “The Reclamation Act,” by the terms of

which the Secretary of the Interior is given power to withdraw from public entry the lands required for any irrigation works contemplated under the provisions of the Act, and to restore to public entry any of the lands so withdrawn, when, in his judgment such lands are not required for the purposes of the Act; and the Secretary of the Interior is also authorized at or immediately prior to the time of beginning surveys for any contemplated irrigation works, to withdraw from entry, except under the homestead laws, any public lands believed to be susceptible of irrigation from said works, provided that all lands entered and entries made under the homestead laws within areas so withdrawn during such withdrawal shall be subject to all the provisions, limitations, charges, terms and conditions of the Act.

Thus we see there are two classes of withdrawal authorized by this Act: One commonly known as "withdrawals under the ^{first} form," which embraces lands that may possibly be needed in the construction and maintenance of irrigation works, and the other commonly known as "withdrawals under the second form," which embraces lands not supposed to be needed in the actual construction and maintenance of irrigation works, but which may possibly be irrigated from such works. (See Circular June 6, 1905, 33 L. D., 607.)

Lands withdrawn under the first form cannot be entered, selected, or located in any manner as long as they remain so withdrawn, and all applications for such entries, selections, or locations, should be rejected and denied regardless of whether they were presented before

or after the date of such withdrawal, and regardless also of the fact that any application may be based upon a settlement made before such withdrawal.

(See Circular June 6, 1905, *supra*.)

Lands withdrawn under the second form, however, can be entered only under the homestead laws, and subject to the provisions, limitations, charges, terms and conditions of the Act, and also applications to make selections, locations or entries of any other kind should be rejected.

(See Circular June 6, 1905, *supra*.)

Section 10 of this Act further authorizes the Secretary of the Interior to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of the Act into full force and effect.

After the passage of this Act the burden of its execution fell upon the Secretary of the Interior, and his construction of its terms, and the effect of its provisions upon preference rights procured by successful contests, become important in a consideration of the question herein raised. And no better way of presenting the construction of this executive officer can be found, than the quotation of the instructions, rules and regulations promulgated by the Secretary, concerning the Reclamation Act and contest of public land entries. And we herewith present in chronological order the rules in point:

Rules, Regulations and Instructions of the Secretary of the Interior, Relating to Reclamation and Contests.

1. Circular of June 6, 1905. (33 L. D., 607.)

The first expression of the Department of the Interior on this subject appears in the Circular of June 6, 1905, sections six and seven of which are as follows:

“Sixth. Any entry embracing lands included within any withdrawal, made under either of the forms mentioned, whether such entry was made before or after the date of such withdrawal, may be contested and canceled because of entryman’s failure to comply with the law or for any other sufficient reason, *and any contestant who secures the cancellation of such entry and pays the land office fees, occasioned by his contest, will be awarded a preferred right of making entry under the Reclamation Act, provided the lands involved are not embraced within a withdrawal of the first form.* (Italics ours.)

“Seventh. When any entry for lands embraced within a withdrawal under the first form is canceled by reason of contest or for any other reason, such lands become subject immediately to such withdrawal and cannot, thereafter, so long as they remain so withdrawn, be entered or otherwise appropriated, either by a successful contestant or any other person; but any contestant who gains a preferred right to enter any such lands may exercise that right at any time within thirty days from notice that the lands involved have been released from such withdrawal and made subject to entry.”

Section six, above quoted, expressly denies a preference right to a successful contestant of an entry on

lands included within a first form withdrawal. This regulation remained in this form until January 19, 1909, when a much stronger declaration and regulation was enunciated; and in this connection it is well to remember that while the lands described in count number one of the indictment herein, were withdrawn under the first form withdrawal, the contest of Ocheltree against the Arnold entry was filed, allowed, and on September 30, 1908, the Arnold entry was canceled and a preference right awarded to Ocheltree by the Land Department, notice of which was served on him in October, 1908. (Tr., pp. 82-84.) And it is also well to remember that during the same time of withdrawal under the first form of the lands described in count number two of the indictment, the contest of Bodkin against Edwards was filed, allowed, and on June 25, 1909, the Edwards entry was canceled by the commissioner and a preference right of entry thereon awarded to Bodkin, of which he had notice prior to January 1910, (Tr., p. 84.)

2. Circular of January 19, 1909. (37 L. D , 365.)

“To Registers and Receivers.

“Sirs: The provisions of the paragraphs 6 and 7 of the regulations concerning lands withdrawn under the Reclamation Act of June 17, 1902, (32 Stats., 388,) approved June 6th, 1905, (33 L. D., 607,) are hereby amended to read as follows:

“6th. No contest will be allowed against any entry embracing land included within the area of any first form withdrawal, and in all cases where a contest has

been allowed prior to such withdrawal, *the withdrawal, if made before the termination of the contest, or before entry by the successful contestant, will, ipso facto, terminate all right that was acquired by reason of such contest.* (Italics ours.)

“7th. Any entry of land embraced within the area of a second form withdrawal may be contested and, if at the date of entry by the successful contestant, the land is under second form withdrawal, his entry will be subject to the limitations and conditions of the Reclamation Act.”

Thus we here find a positive declaration by the Department of the Interior, which, applied to the Ocheltree and Bodkin contests, would have terminated any preference right acquired by reason of such contests. Both the foregoing circulars indicate in the plainest of language that contests cannot be maintained against entries embraced within first form reclamation withdrawals, *so as to give birth to any preference right*, and the latter declares that the withdrawal of the lands *ipso facto* terminated all rights that Ocheltree or Bodkin might have acquired by reason of their contests, for section 6 provides and declares that even if a contest is terminated, and a preference right awarded prior to withdrawal, the withdrawal, if made prior to entry by the successful contestant, *ipso facto*, terminates such preference right.

These two sections, six and seven, as amended in 1909, were again promulgated in a circular of the land department issued May 31, 1910, embodying the law and regulations relating to reclamation of arid lands, but are therein numbered 19 and 20.

3. Circular of May 30, 1910. (38 L. D., 620-631.)

“19. No contest will be allowed against any entry embracing land included within the area of any first-form withdrawal, and in all cases where a contest has been allowed prior to such withdrawal, the withdrawal, if made before the termination of the contest or before entry by the successful contestant, will *ipso facto*, terminate all right that was acquired by reason of such contest.

“20. Any entry of land embraced within the area of a second form withdrawal may be contested, and if at the date of entry by the successful contestant the land is under second form withdrawal, his entry will be subject to the limitations and conditions of the reclamation act.”

4. Circular of October 19, 1910, Relating to Contests Against Entries Embraced Within Reclamation Withdrawals. (39 L. D., 296-)

“The Honorable the Secretary of the Interior.

“Sir: In compliance with the instructions contained in your letter of October 11, 1910, it is respectfully recommended that paragraphs 19 and 20 of the circular approved May 31, 1910 (38 L. D., 620), be amended so as to read as follows:

“19. No contest will be allowed against any entry embracing land included within the area of any first form withdrawal or land reserved for irrigation purposes, commonly known as land under the second form of withdrawal, until the Secretary of the Interior shall have established the unit of acreage and fixed the water

charges, and the date when the water can be applied and made public announcement of the same, and in all cases where a contest has been allowed prior to such withdrawals, the withdrawal, if made before the termination of the contest, will *ipso facto* terminate all right that was acquired by reason of such contest. In cases where contest has been allowed as to entries on second form lands, the act of Congress approved June 25, 1910 (Public No. 289), precludes entry by successful contestants until the lands are restored to the public domain or platted to farm units and covered by public notice under section 4 of the reclamation act.

“If the approval of the act preceded the termination of the contest, all rights thereunder were *ipso facto* terminated by the act, but in all cases where a preference right has been gained by virtue of a successful contest, terminated before the withdrawal of the land or the passage of the said act, the successful contestant may exercise his right and make entry at any time within thirty days from notice that the lands involved have been restored to the public domain, or covered by public notice and made subject to entry, but, in the latter event, his entry must be made subject to the limitations, charges and conditions imposed by the reclamation act.

“20. Any entry of land embraced within the area of a second-form withdrawal may be contested after farm units have been established covering such entry, and public notice has issued in connection with the same, fixing the water charges and the date when

water can be applied, and if at the date of entry by the successful contestant, the lands have not been released from the withdrawal under the provisions of the reclamation act, his entry will be subject to the limitations, charges and conditions imposed by that act.”

“The recognition of preference right in successful contestants, where contests have terminated prior to the withdrawal of the lands involved is in accordance with the present practice, and the exercise of that right is provided for in a manner similar to that set forth in the circular of June 6th, 1905. (33 L. D.. 607.)

“It is respectfully recommended that you attach your approval to this letter and cause it to be returned to this office.

Very respectfully,

FRED. DENNETT,
Commissioner.

Approved Oct. 19th, 1910,

L. A. BALLINGER, Secretary.”

While the foregoing statement of rules might have been made much simpler and with less verbiage, still it is apparent that the author thereof recognizes the old rule that contests are not to be allowed against entries of lands embraced within a first-form withdrawal, for the first statement in rule 19 is: “No contest will be allowed against any entry embracing land included within the area of any first-form withdrawal;” while all the rest of the section relates to contests of entries on second-form withdrawals, and to the changes occasioned by the passage of the act of Congress of June

25, 1910 (36 Statutes, 835), in section 5 of which it is provided:

“That no entry shall hereafter be made and no entry-man shall be permitted to go upon lands reserved for irrigation purposes until the Secretary of the Interior shall have established the unit of acreage and fixed the water charges and the date when the water can be applied and made public announcement of the same.”

All of which relates exclusively to second-form withdrawal lands, entries on which could always theretofore be contested for cause, and a preference right awarded to the successful contestant, who could exercise it, subject however to the limitations of the reclamation act.

5. Circular of April 29, 1912, Relating to Reclamation of Arid Lands. (40 L. D. ,641.)

In this circular from which we also quote sections 10 and 15, the subject matter of contests is reduced to one section numbered 23, from which it again appears that contests of entries on lands embraced within a first-form withdrawal will not be allowed, the new rule inserting the word “private” before the word “contest.”

“Sec. 10. After lands have been withdrawn under the first form they cannot be entered, selected or located in any manner so long as they remain so withdrawn, and all application for such entries, selections or locations, should be rejected and denied, regardless of whether they were presented before or after the date of such withdrawal. (See John J. Maney, 35 L. D., 250.)”

“Sec. 15. Upon the cancellation of a homestead entry covering lands embraced within a withdrawal under the Reclamation Act such withdrawal becomes effective as to such lands without further order. (See Cornelius J. McNamara, 33 L. D., 520.)”

“Sec. 23. No private contest will be allowed against any entry embracing land included within the area of any first form withdrawal, or land reserved for irrigation purposes, commonly known as land under the second form of withdrawal, until the Secretary of the Interior shall have established the unit of acreage and fixed the water charges, and the date when the water can be applied and made public announcement of the same. In cases where contest has been allowed as to entries on second form lands, the Act of Congress approved June 25, 1910, (36 Stat., 835,) precludes entry by successful contestants until the lands are restored to the public domain or platted to farm units and covered by public notice under Section 4 of the Reclamation Act. In all cases where a contest has been allowed prior to the withdrawal of the lands, or in the case of entries on second form lands, prior to the approval of the Act of June 25, 1910, the withdrawal attaches to the lands involved immediately on cancellation of the entry, and no rights can be obtained by the contestant in the event that the entry is canceled under the contest proceedings prior to the vacation of the order of withdrawal and opening of the lands to entry. In all cases where a preference right has been gained by virtue of a successful contest, terminated before the withdrawal of the land

or the passage of said Act, the successful contestant may exercise his right and make entry at any time within thirty days from notice that the lands involved have been restored to the public domain, or covered by public notice and made subject to entry, but, in the latter event, his entry must be made subject to the limitations, charges, and conditions imposed by the Reclamation Act.”

And the rule is also somewhat changed in its terms to comply with an Act of Congress of February 18, 1911, (36 Stat., 917,) amending Section 5 of the Act of June 25, 1910, *supra*.

6. Circular of August 24, 1912, Relating to Contests of Lands Withdrawn Under the Reclamation Act.

(41 L. D., 171.)

“The Commissioner of the General Land Office.

“Sir: Through contests, and otherwise, my attention has been repeatedly directed to the regulations of of January 19th, 1909, (37 L. D., 365,) wherein the provisions of paragraphs six and seven of the regulations concerning lands withdrawn under the Reclamation Act of June 17th, 1902, (32 Stat., 388,) approved June 6, 1905, (33 L. D., 607,) were amended to read as follows:

“6th. No contest will be allowed against any entry embracing land included within the area of any first form withdrawal, and in all cases where a contest has been allowed prior to such withdrawals, the withdrawal, if made before the termination of the contest, or before entry by the successful contestant, will, *ipso jacto* ter-

minate all right that was acquired by reason of such contest.

“7th. Any entry of land embraced within the area of a second-form withdrawal may be contested and, if at the date of entry by the successful contestant, the land is under second-form withdrawal, his entry will be subject to the limitations and conditions of the reclamation act.”

“After a most careful consideration of the matter I am of opinion that the change made by the circular of January 19, 1909, is detrimental to public interests, believing that contests should be permitted of all claims whether within a first-form reclamation withdrawal or elsewhere, upon a sufficient charge, which if proven would avoid a claim or cause its cancellation. The regulations of January 19, 1909, are therefore revoked and paragraphs six and seven of the regulations of June 6, 1905, *supra*, are reaffirmed or restored with the following modification as to paragraph 6:

“Sixth. An entry embracing lands included within a withdrawal, made under either of the forms mentioned, whether such entry was made before or after the date of such withdrawals, may be contested and cancelled because of entryman’s failure to comply with the law, or for any other sufficient reason, and any contestant who secures the cancellation of such entry and pays the land office fees occasioned by his contest, will be awarded a preferred right of making entry. Should the land embraced in the contested entry be within a first-form withdrawal at time of successful termination of the

contest, the preferred right may prove futile, for it cannot be exercised as long as the land remains so withdrawn. Should it be within a second-form withdrawal, however, he (the contestant), may make entry under the terms of the reclamation act, and should it at that time, be excluded from all forms of withdrawal, he may enter as in other cases made and provided. It should be the duty however of such contestant to keep the local officers advised respecting his residence, to which notice may be sent him of his preference right of entry in event of successful contest, and a notice mailed to his address, shown by the records of the local land office at the time of the mailing of the notice of preference right, will be held to meet the requirement of the act of May 14, 1880. (21 Stat., 140.)”

“I understand that the cause assigned for denying the right of contest in the regulation of 1909 was the fact that, to a great degree, the contestant although successful in his contest, was unable to realize thereon because of the need of the lands for governmental use; and, further, that in instances where the lands were not desired for governmental use, their restoration, occurring at a date so far distant from the successful termination of the contest, led to confusion because of overlooking the outstanding preference right at the time of the opening of the land to entry, and at the time of entry of the lands by another.

“With respect to the lands that are desired for governmental use, the contestant brings his contest with the knowledge that it may prove futile because of that

contingency, and while there is, of course, danger of overlooking any postponed right, it seems to me that by appropriate notation upon the records, particularly the the plats of the local land office where the land is disposed of, certainly when other application is filed therefor, and if appropriate notice has not already been issued to the contestant, it should then be given, and no other disposition made of the lands pending the period of preference right accorded by the statute.

“Your future actions respecting contests will be governed accordingly. So instruct the local officers.

Very respectfully,

SAMUEL ADAMS,
First Assist. Secretary.”

It is rather a remarkable coincidence that this circular, issued in August, 1912, completely reversing the former rules relating to the subject of contests on lands embraced within first-form reclamation withdrawals, and purporting to allow such contests, although the preference right gained thereunder might be “futile,” was promulgated just after the Culpepper and Edwards applications for homestead entries had been canceled, and the preference rights, so called, of Ochelfree and Bodkin, allowed by the local land office officials at Los Angeles, to-wit: on June 1, 1912, and after the lands embraced in the two applications and contests, had been restored to public entry.

While this rule, being *ex-post facto*, cannot legally affect the status of the contests of, and the preference rights awarded to Ocheltree in 1908, and Bodkin in

1909, yet it does prove, especially by the explanation of the First Assistant Secretary, accompanying it, that, theretofore, contests of entries on lands embraced within a first form reclamation withdrawal, were not effective to create a valid preference right under the law and the rules of the department. And yet the department did allow the Ocheltree and Bodkin contests to be initiated, carried on and completed to the awarding of a so-called preference right while the lands embraced within the contested entries were withdrawn under the first form reclamation withdrawal. Thus we behold the anomalous situation of the department saying a thing cannot be done and at the same time doing it.

It also will be noticed that the First Assistant Secretary in issuing this circular, by which he revokes paragraphs 6 and 7 of the regulations of January 19, 1909, and restores sections 6 and 7 of the regulations of June 6, 1905, with his "modification" of Section 6, does not mention the regulations on the identical subject of May 31, 1910, nor of October 19, 1910, nor of April 29, 1912. The last mentioned being hardly dry from the press. And it will be observed also, that while this circular of August 24, 1912, allows contests of entries on lands embraced within a first form withdrawal, yet nowhere therein is there any regulation requiring the subsequent recognition of the "preference right" to be awarded to the successful contestant over first form withdrawal lands, but on the contrary the regulation admits that the "preferred right may prove futile," if the land embraced in the contested entry be within a

first form withdrawal at the time of successful termination of the contest.

Apparently not satisfied with his efforts of August 24th, 1912, the same First Assistant Secretary, some ten days later again essayed to make the regulations fit his ideas of such contests and produced the Circular of September 4, 1912.

7. Circular of September 4, 1912, Relating to Contests of Land Withdrawn Under Reclamation Act.

(41 L. D., 241.)

“The Commissioner of the General Land Office.

“Sir: Referring to Departmental decision of August 24, 1912, (41 L. D., 171,) re-affirming or restoring with modifications, paragraph 6 and 7, of the regulations of June 6, 1905, (33 L. D., 607,) with respect to contests concerning lands withdrawn under the reclamation act of June 17, 1902, (32 Stat., 388,) said sections are hereby amended to read as follows:

“Sixth. An entry embracing lands including within a withdrawal made under either of the forms mentioned, whether such entry was made before or after the date of such withdrawal, may be contested and canceled because of entryman's failure to comply with the law, or for any other sufficient reason, and any contestant who secures the cancellation of such entry and pays the land office fees occasioned by his contest, will be awarded a preferred right of making entry. Should the land embraced in the contested entry be within a first form withdrawal at time of successful termination of the contest,

the preferred right may prove futile, for it cannot be exercised as long as the land remains so withdrawn. Should it be within a second form withdrawal, however, he (the contestant) may make entry under the terms of the Reclamation Act, and should it, at that time, be excluded from all forms of withdrawal, he may enter as in other cases made and provided. [No contest can be allowed, however, against any qualified entryman who, prior to June 25, 1910, made *bona fide* entry upon lands proposed to be irrigated and who established residence in good faith upon the lands entered by him, for failure to maintain residence or to make improvements upon his land prior to the time when water is available for its irrigation. Successful contestants against entries in second forms withdrawals, reclamation projects, cannot be allowed to exercise preference right of entry prior to the time when the Secretary shall have established the unit of acreage, fixed the water charges and the date when water can be applied and made public announcement of the same.] It should be the duty, however, of such contestants to keep the local officers advised respecting his residence, to which notice may be sent him of his preference right of entry in event of successful contest, and a notice mailed to his address, shown by the records of the local land office at the time of the mailing of the notice of preference right, will be held to meet the requirements of the act of May 14, 1880, (21 Stat., 140.)

“Seventh. When any entry for lands embraced within a withdrawal under the first form or under the

second form, Section 5, of the Act of June 25, 1910, (36 Stat., 835,) is canceled by reason of contest or for any other reason, such lands become subject immediately to such withdrawal and cannot thereafter, so long as they remain so withdrawn, be entered or otherwise appropriated, either by successful contestant or any other person, but any contestant who gains a preferred right to enter any such lands may exercise that right at any time within thirty days from notice that the lands involved have been released from such withdrawal and made subject to entry.”

“Department decision of Aug. 24th, 1912, is modified and your future action respecting contests will be governed accordingly. So advise the local land officers.

Very respectfully,

SAMUEL ADAMS,

First Assistant Secretary.”

Herein we find Section 6, the same as promulgated August 24, 1912, with the addition therein, however, of that part which we have enclosed in brackets. But herein we also find that Section 7 has been so amended as to prolong the life of the preference right to be awarded to the successful contestant of entries embraced within first form reclamation withdrawals to “thirty days from notice that the lands involved have been released from such withdrawal and made subject to entry.”

That is exactly what the Department had done in fact only three months before, when it allowed the preference rights of Ocheltree and Bodkin, theretofore granted them, to overcome the settler's rights of Cul-

pepper and Edwards, respectively. Hence we claim that the Department has not only gone contrary to the law, but contrary to its own regulations in these two cases, and thereafter in the interests of harmony made two efforts to draft a regulation to fit its decision.

8. Circular of February 6, 1913, Containing Laws and Regulations Relating to the Reclamation of Arid Lands.

(42 L. D., 35-37.)

“25. An entry embracing land included within a first or second form reclamation withdrawal, whether such entry was made before or after the date of such withdrawal, may be contested and canceled because of entryman's failure to comply with the law or for any other sufficient reason, and any contestant who secures the cancellation of such entry and pays the land office fees occasioned by his contest will be awarded a preferred right of making entry. Should the land embraced in the contested entry be within a first form withdrawal at time of successful termination of the contest the preferred right may prove futile, for it cannot be exercised as long as the land remains so withdrawn. Should it be within a second form withdrawal, however, the contestant may make entry under the terms of the reclamation law, and should it at that time be released from all forms of withdrawal, he may enter as in other cases made and provided. No contest can be allowed, however, against any qualified entryman who, prior to June 25, 1910, made *bona fide* entry upon lands proposed

to be irrigated and who established residence in good faith upon the lands entered by him, for failure to maintain residence or to make improvements upon his land prior to the time when water is available for its irrigation. Successful contestants against entries in second form reclamation withdrawals cannot be allowed to exercise preference right of entry prior to the time when the Secretary shall have established the unit of acreage, fixed the water charges, and the date when water can be applied and made public announcement of the same. It should be the duty, however, of such contestant to keep the local officers advised respecting his residence to which notice may be sent him of his preference right of entry in event of successful contest, and a notice mailed to his address, shown by the records of the local land office at the time of the mailing of the notice of preference right, will be held to meet the requirements of the Act of May 14, 1880, (21 Stat., 140.)

“26. When any entry for lands embraced within a first or second form reclamation withdrawal is canceled for any reason, such lands become subject immediately to such withdrawal. Such lands under first form withdrawal cannot therefore, so long as they remain so withdrawn, be entered or otherwise appropriated either by a successful contestant or any other person; but any contestant who gains a preference right to enter any such first form withdrawal lands may exercise that right at any time within thirty days from the notice that the lands involved have been restored to the public domain or the withdrawal changed to sec-

ond form. Such lands withdrawn under second form withdrawal may be entered under the reclamation act when subject to entry by reason of public notice having been issued as in these regulations provided, and a contestant in such case will be allowed thirty days preference right to make entry.”

The above sections 25 and 26 of this circular are almost identical with sections six and seven of the previous circular of September 4, 1912, the only difference being the language used in the opening sentence of each section, and it re-announces the new doctrine of the “floating” preference right.

Having reviewed at length all the regulations and instructions of the executive department having charge of the public lands of the United States, it now remains our duty to find from its decisions, how it has been construing the statute creating this preference right, and what has been its action concerning contests of entries on first form withdrawal lands, prior and up to the action of June 1, 1910, on the Ocheltree and Bodkin preference rights applications. As we have already cited and quoted from many cases touching the subject of contests and preference rights in general, we now devote ourselves to citing and quoting only from cases involving reclamation withdrawals, and the relation of preference rights thereto.

In the case of John J. Maney, 35 L. D., 250, the Secretary decided:

“Indeed, even a valid homestead entry for land within the limits of a withdrawal for irrigation works,

under the authority of the act of June 17, 1902, existing at the date of such withdrawal, upon which entry final certificate had not issued, or the legal or equitable title to the land embraced therein become vested, may be canceled by the department if it appears that such land is required for use in the construction and maintenance of such work. (Instructions June 5, 1905, 33 L. D., 607. Instructions October 12, 1905, 34 L. D., 158. Opinion January 25, 1906, *Id.* 421. Opinion February 20, 1906, *Id.*, 445), for, as was stated in instructions of January 13, 1904 (32 L. D., 387), such withdrawals have the force of legislative withdrawals, and are therefore effective to withdraw all lands within designated limits to which right has not vested.”

One of the best considered cases decided by the department involving this subject, comes shortly after the passage of the reclamation act, to-wit: on January 14, 1904, and from it we quote rather freely. It is the case of Emma H. Pike, 32 L. D., 395:

“It is well settled that an executive order creating a reservation for a public purpose, and embracing land covered by a *prima facie* valid entry, will take effect thereon if the entry is subsequently canceled. Charles W. Filkins (5 L. D., 49); Staltz vs. White Spirit et al. (10 L. D., 144); James M. Gilman (15 L. D., 2); and Hostrawser vs. McSwain (18 L. D., 523). In the latter case it was held (syllabus):

“ ‘A contestant who successfully attacks an entry covering a tract of land embraced within the limits of a withdrawal for a public reservation made after said

entry was allowed, does not thereby secure a right that will exclude said tract from the operation of the order creating the reservation.' ”

The Secretary then proceeds to cite and quote from the case of Jefferson E. Davis (19 L. D., 489), and from the case of William H. Schmith (30 L. D., 6), hereinbefore quoted by us, and then proceeds:

“In respect to the force or character of the right secured by Emma H. Pike under the act of May 14, 1880 (21 Stat. 140), by reason of her contest against the Yarten entry, certain language used in the case of Strader vs. Goodhue (31 L. D., 137) is referred to and relied upon in her appeal here. That language is as follows:

“ ‘The preference right is not a vested right until a contestant has “contested, paid the land office fees, and procured the concellation” of the entry attacked.’

“But the facts in that case alone negative the suggestion that it was intended to hold, as a proper construction of the act of May 14, 1880, that even when a contestant has performed all the prerequisites imposed by said act he thereby secures *vested* right. Such a construction would of course imply that the right is of such force and character that it could not be divested even by an Act of Congress, authorizing the withdrawal of the land involved for some contemplated public purpose. The reverse of this proposition appears in numerous decisions both of the department, some of which are cited herein, and of the Supreme Court. * * *

“That the purpose of section 2 of the act of May 14, 1880, *supra*, was solely to award to the contestant a preferred right for thirty days to enter the land *as against every one except* the United States, is well established.”

After quoting the language of the section, the decision continues:

“In no manner can this language be fairly construed as conferring a vested right upon a successful contestant. The act only confers a privilege on him to enter the land in preference to others. *As to other claimants he has a superior right for a limited period to enter the land.* (Italics ours.) But it is a right that may be waived by the contestant; it does not extend to one who is disqualified from entering the land; *only after its exercise does it become effective to exclude adverse claims.* (Italics ours.) And even then the contestant must fulfill the requirements of the law under which he makes entry, before procuring title. It is not a right that *reserves* the land from other disposal. In the language of the circular of July 4, 1899. (29 L. D., 29:

“Thereafter, and until the period accorded a successful contestant has expired or he has waived his preferred right, applications may be received, entered, and held subject to the rights of the contestant, the same to be disposed of in the order of filing upon the expiration of the period accorded the successful contestant or upon the filing of his waiver of preferred right.”

“The Act authorizing the withdrawal and the order carrying the same into effect, covering the township in

which the land here in question is situated, *were both made prior to the cancellation of the entry contested by Emma H. Pike. Under the rulings, whatever preferred right she may have had, the same not amounting to a vested right, was defeated by the intervening order of withdrawal which took effect immediately upon the cancellation of the contested entry.*” (Italics ours.)

The next case of interest is that of Ernest Woodcock, 38 L. D., 349, decided Dec. 14, 1909.

“Ernest Woodcock has appealed from your decision of July 15, 1909, in which affirming the action of the Register and Receiver at North Yakima, Washington, you rejected Woodcock’s application 02586 to make homestead entry for the N. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$ Sec. 28, T. 13, N. R. 17 E., for the reason that the land is included within a first form withdrawal under the Act of June 17, 1902, (32 Stat., 388;) the withdrawal having been made by order of the Secretary of the Interior, dated October 9, 1905. It is urged in the brief and argument of appellant accompanying his appeal, that error was committed in holding that the land was withdrawn from all forms of entry under the Reclamation Act, for the alleged reason that no irrigation works are to be constructed thereon and the withdrawal for any other purpose is not warranted by the law. It is further contended that the application should have been received and held suspended until a contestant, who secured a cancellation of a homestead entry formerly embracing this land, had an opportunity to exercise his preference right upon one of the farm units, which it is

assumed will be created from the lands withdrawn and thereafter upon the restoration of the lands to entry, appellants application to enter should be allowed.

“The act of June 17, 1902, authorizes the Secretary of the Interior to withdraw ‘from public entry the lands required for any irrigation works contemplated under the provisions of this Act.’ Such withdrawals are legislative in their effect and preclude the allowance of any application or filing therefor under the public land laws. The motives or purposes of the officers making the withdrawal cannot be attacked by appellant, for, as held in the case of *Riverside Oil Company vs. Hitchcock*, (190 U. S., 316,) ‘Neither an injunction or mandamus will lie against an officer of the Land Department to control him in discharging an official duty which requires the exercise of his judgment and discretion.’ In the case of *Wolsey vs. Chapman*, (101 U. S., 755,) the court held that a withdrawal by the proper executive of the government was sufficient to defeat a settlement for the purpose of pre-emption while the order was in force, ‘notwithstanding it was afterwards found that the law by reason of which the action was taken did not contemplate such a withdrawal.’

“Whether this particular tract of land is or will be required or used in the construction of irrigation works is a question to be determined by the Secretary of the Interior, and until he has reached a determination of that question, the Act of June 17, 1902, authorizes him to withhold the land from appropriation and disposition. It is a general rule well supported by both law and good

administration that no rights are obtained by an attempt to settle or file upon lands at the time embraced in a reservation or withdrawal made by or under proper authority.

“Your decision in rejecting the homestead application to enter is accordingly hereby affirmed.”

A review of the decisions of the Land Department on the subject of preference rights accruing from successful contests, would not be complete without considering the case of Fairchild vs. Eby, 37 L. D., 362, decided December 28, 1908, as this decision created the rules announced in the Circular of January 19, 1909, relating to contests of entries on withdrawn lands.

The facts of that case are briefly these:

On August 19, 1907, Eby filed a contest against a desert land entry of one Spangler, while the lands embraced in the entry were withdrawn under the first form reclamation withdrawal by order of May 6, 1904. The contest was entertained by the local land office and on January 14, 1908, Eby was notified, (erroneously so the Department says in the opinion,) of the cancellation of the entry, ^{and} ~~said~~ that he had thirty days preference right within which to file on the land. On February 9, 1908, Eby appeared for the purpose of making entry and was informed that by reason of withdrawal on May 6, 1904, the land was not available for entry. On March 2, 1908, the lands involved were restored to entry under the second form. On March 30th, 1908, Fairchild filed application to enter. On April, 13, 1908, Eby again applied to enter the land in question, but was informed

that the same had been entered by Fairchild. On April 14, 1908, the local officers by letter, notified Fairchild that his entry was improperly allowed, as a preference right to said land was outstanding in favor of Eby. On June 13, 1908, the Commissioner affirmed the action of the local officers, and appeal was taken to the Secretary, who then proceeds in his decision as follows:

“The case is now before this Department on appeal, filed by Sherman D. Fairchild, which contends that the contest should not have been entertained in the first instance because said land is within a government reserve and that even if a preference right ever existed in favor of Daniel A. Eby by reason of his contest, it was for thirty days next after notice to him after the cancellation of Spangler’s entry.

“The contention of Fairchild that the contest should not have been allowed would be tenable but for the regulations of the department of June 6, 1905 (33 L. D., 607), the sixth section of which expressly provides for the allowance of contests against any entry covered by a withdrawal for reclamation purposes, whether the withdrawal is of lands for use in the construction and operation of reclamation works, or of lands susceptible to irrigation from such works.

“When a contest is filed under said rule against an entry which is covered by a withdrawal for use by the government, the seventh section of said regulations provides that the land cannot be appropriated by a successful contestant so long as the lands remain withdrawn; “but any contestant who gains a preferred right to enter

such lands may exercise that right at any time within thirty days from notice that the lands involved have been released from such withdrawal and made subject to entry."

"It was thus contemplated that the preference right allowed by the sixth section should remain suspended if the land was not subject to entry at the date of cancellation, but that the preference right so acquired might be exercised whenever the land was restored. Whether a contest challenging the validity of any entry should or should not be allowed is a matter resting within executive jurisdiction, but when it has been allowed, and in pursuance thereof the entry has been canceled as the result of such contest, the right of the successful contestant to a preference right of entry of such land whenever it is restored to entry is a legal right given by the statute and cannot be controlled by executive discretion.

"It follows that after the land has become subject to entry, Eby was entitled to the usual notice provided by the statute of the preference right to make entry of the land within the statutory period. As such notice was not given, the entry of Fairchild was improperly allowed and must be canceled.

"But for the express provision in section 6 of said regulation Eby could not have acquired a preference right of entry, for the reason that at the date of the filing of his contest the lands had been appropriated by the government for contemplated use in the construction and operation of irrigation works, and every one, in

the absence of such rule, would be put upon notice that he could not acquire a right to enter the land upon the cancellation of the entry.

“A regulation that contemplates the acquisition of legal rights that must be suspended indefinitely can only result in great confusion in the disposal of the public lands and ought not to have been made and should not be continued. Such is the apparent result of the right conferred by the sixth and seventh regulations of June 6, 1905, and it is believed that the interest of the government, as well as the general public, will be subserved by their revocation. In the future no contest will be allowed against any entry of land that has been appropriated by the government, and in all cases when a contest has been allowed before such appropriation, the withdrawal of the land for use by the government before the termination of the contest, or an entry by the successful contestant, will ipso facto terminate all right that was acquired by reason of such contest. (Italics ours.)

“A contest should be allowed against any entry of lands susceptible of irrigation from any government works, either before or after the withdrawal of such lands, but if the lands shall have been withdrawn before the successful contestant enters, his entry will be subject to the limitations and conditions of the reclamation act.

“It is therefore directed that sections six and seven of of the regulations of June 6, 1905, be amended accordingly.

“Your decision is affirmed.”

We respectfully suggest that the above decision is essentially wrong, and on its face shows wherein the Secretary misapplied and misconstrued the two sections referred to. Section six of the regulations is relied upon by the Secretary as the creator of the preference right claimed by Eby, and yet the same section expressly declares that a preference right *shall not* be awarded to the successful contestant *if the lands involved are embraced within a first form withdrawal*.

Furthermore we contend that the Interior Department has no power of control over the statutory preference right, so as to suspend it during departmental discretion. Such is the action of the department in this case, and such was its action in the cases at bar. A careful consideration of the foregoing decision will demonstrate that the ruling therein was not only contrary to law, as we herein contend, but was in fact directly contrary to the regulation upon which the decision is based for its authority.

Besides, under the new regulations adopted by this decision both the Ocheltree and Bodkin preference rights would be declared terminated by the withdrawal, *as neither made entry thereunder prior to the withdrawal*. One might appropriately say that the so called preference rights of Ocheltree and Bodkin under the circumstances and the then rules, as well as the law, as we contend the law is, were “still born,” rather than being born alive, and preserved until restoration of the lands by the incubation process of “suspension” adopted by the land department.

We now come to a consideration of the decision of the land department in the case of Beach vs. Hansen (40 L. D., 607), rendered April 3, 1912, just two months prior to the rejection of the Culpepper and Edwards homestead applications based on settlers' preference rights, and the allowance of the applications of Ocheltree and Bodkin, based on the preference rights theretofore awarded them, and undoubtedly this decision was controlling in the action of the local land officers on that occasion. It is as follows:

“Harry E. Beach appealed from decision of the Commissioner of the General Land Office of June 29, 1911, rejecting his application for homestead entry for S. E. $\frac{1}{4}$ Sec. 4, T. 8 N., R. 29 E., W. M., Walla Walla, Washington.

“February 23, 1902, Fred A. Hall made homestead entry for this land against which George E. Hanson filed contest, which effected its cancellation January 22, 1908.

“December 29, 1905, the land was withdrawn for use in Yakima project, and was restored August 18, 1910, to settlement November 8, and to entry December 8, 1910, on which day Beach filed homestead application, alleging settlement, November 8, 1910.

December 12, 1910, Hanson was allowed to make desert land entry in exercise of his preference right as successful contestant and Beach's homestead application was that day rejected for conflict therewith. The commissioner affirmed that action.

It is assigned as error of the decision that paragraph

6, instructions of January 19, 1909, (37 L. D., 365,) and of October 15, 1910, (36 L. D., 296,) and Act of June 25, 1910, (36 Stat., 835,) absolutely terminated any preference right of Hanson.

“It is true that Hanson got no right as against the United States to enter the land embraced in Hall’s entry, then withdrawn for use in Yakima project. This is because the paramount *supposed* interest of the United States will not permit another entry. *But if it be found that no interest of the United States requires appropriation of the land to public use, and that the withdrawal was made under misapprehension of fact, the preference right attaches, for that is statutory, granted by act of May 14, 1880, (21 Stat., 140.)* (Italics ours.) The land department has no authority by regulation to disregard the act or deny the right. Regulations apply to land under *proper* withdrawals for public use and for protection of public interest. Thus in Wright vs. Francis et al., 26 L. D., 499, the Department held that when exercise of a contestant’s preference right was prevented by withdrawal of the land for reclamation before expiration of the preference period, and it was restored to entry, the right may be exercised within thirty days after such restoration. The present case like that in Wright vs. Francis, involves land withdrawn pending contest. The two cases differ in no material respect.
* * * The decision is affirmed.”

Inasmuch as the foregoing decision seems to be based on that in Wright vs. Francis, as its guide and authority, let us examine that case.

Wright vs. Francis et al., (36 L. D., 499.)

Decided June 6, 1908.

Briefly stated the facts in this case, as pertinent hereto, are as follows:

On July 30, 1903, Wright instituted contest against homestead entry of one Armstrong.

On April 24, 1905, the Armstrong entry was canceled and Wright given a preference right to enter the tract embraced in the Armstrong entry.

On May 27, and June 3, 1905, Wright in the exercise of his preference right, filed separate applications for each governmental subdivision to enter the land in controversy.

On June 13, 1904, while the contest was pending and undetermined, the Department withdrew this land from entry, filing or selection *under the second form of the Reclamation Act of June 17, 1902.*

On March 8, 1905, the Department released the land from such withdrawal restoring same to settlement on that date, and to entry June 20, 1905.

On April 24, 1905, Francis filed application to enter the land as a homestead, this being the same day that the Armstrong entry was canceled and the preference right awarded to Wright. The Francis application was held in obedience pending the exercise of the preference right awarded Wright, but was thereafter rejected because presented at a time when the land was not subject to entry.

On June 3, 1905, the local officers rejected Wright's application, for the reason that the lands embraced

In the decision in *Beach vs. Hansen*, the Secretary says that that case differs in no material respect from the *Wright vs. Francis* case. We very respectfully suggest that the two cases are entirely and fundamentally dissimilar, in that the *Beach vs. Hansen* case involves a *first form withdrawal*, and the *Wright vs. Francis* case a *second form withdrawal*. And while the former case deals with Section 6 of the Circular of 1905, the latter case deals with Section 7 thereof. And while Section 6 of the Circular of 1905, denies a preference right to the successful contestant of an entry on *first form withdrawal* lands, such as were involved in the *Beach vs. Hansen* case, Section 7 of that Circular which was in force in 1908 at the time of the decision in *Wright vs. Francis*, *expressly confers on the successful contestant of an entry on second form withdrawal lands, the right* at any time within thirty days from notice that the lands involved have been released from withdrawal and made subject to entry, to exercise the preference right authorized by the act of May 14, 1880, and expressly recognized by Section 6 of that Circular.

Beside at that time a second form withdrawal did not operate to prevent homestead entries on the withdrawn lands, for Section 4 of the Reclamation Act provides that: "The Secretary of the Interior is hereby authorized at or immediately prior to the time of beginning surveys for any contemplated irrigation works, *to withdraw from entry, except under the homestead laws, any public lands believed to be susceptible of irrigation from said works*; provided, that all lands entered and entries

made under the homestead laws within areas so withdrawn during such withdrawals shall be subject to all the provisions, limitations, charges, terms, and conditions of this Act.” (32 Stat., 388.)

This right of homestead entry on second form withdrawn lands existed at the time of the Wright vs. Francis decision, and until June 25, 1910, when section 5 of the act of that date was enacted, providing that no entry shall be made on second form withdrawn lands, “until the Secretary of the Interior shall have established the unit of acreage, fixed the water charges and the date when the water can be applied and made public announcement of the same.” (35 Stats., 835.)

In the Wright vs. Francis case, the contest was initiated before withdrawal, which was of the *second form*, was continued and allowed, the entry cancelled and a preference right awarded, while the land was withdrawn from entry under *second form withdrawal*. Within thirty days from notice of such preference right, Wright filed application to enter under his preference right, but at the time the lands were not yet restored to *general* entry, although they were open to *homestead* entry under the reclamation act, the full restoration taking place a few days later, to-wit: on June 20, 1905.

Under these facts the Secretary decided the Wright application to exercise his preference right was filed in time.

This is entirely different from the facts in the Beach vs. Hansen case, and instead of supporting the conclusion arrived at in that decision, the Wright vs. Francis

decision demonstrated that the Beach vs. Hansen case was wrongly decided, and does not find support in the former decision at all. As a matter of plain fact demonstrated by the language of the decision in Beach vs. Hansen, the conclusion therein reached and the recognition of the so called preference right of Hansen *was arbitrarily made and given on the assumption by the land department that the withdrawal of the land involved under the first form for use in the Yakima Project was made under misapprehension of fact.*

And having made this arbitrary assumption, the department proceeds to arbitrarily declare that, such being the case, the preference right, awarded during such withdrawal, attaches and cannot be disregarded by the department. And this action of the department was done directly contrary to section 6 of its own regulations of 1909.

In another decision (rendered August 29, 1913), of the department in the case of Chas. E. Wells vs. Florence V. Bodkin, the former being father of two of the defendants herein, and the latter being daughter of Patrick H. Bodkin described in the indictment herein, the true character and limitations of the statutory preference right is recognized.

Wells had settled and filed on a quarter section in the same neighborhood as plaintiffs in error herein, and on the same days. Florence V. Bodkin had theretofore contested to successful termination a former entry on the same land, and had been awarded a preference right, which she sought to exercise by filing her declar-

ation of homestead, based thereon, on May 18, 1910. But prior to June 1, 1912, when the local land office acted on these two applications, Florence V. Bodkin died.

The Secretary in deciding that the heirs, if qualified, may succeed to such preference right on death of the successful contestant, used this language:

“He is given by the act of May 14, 1880, if a qualified person, a right of entry as to the lands involved, as a reward for initiating contest and prosecuting same to a cancellation of the contested entry, and he must be assumed to have in contemplation when he initiated his contest, as he is required by the present rules of practice to have, the ultimate making of an entry based on such contest as its fruition and end. His contest carries with it therefore, an *incipient and inchoate statutory right of entry*, and is in legal effect subsisting as between him and the United States, as the basis for such right of entry, until said right is exercised, waived or lost by some act of his, or is foreclosed by some interest of the government or by limitation of the law.” (42 L. D., 340.)

After reading the Beach vs. Hansen decision, which, as said before, was rendered April 3, 1912, we can understand the attitude of the land department towards the Culpepper and Edwards entries, as opposed by the Ocheltree and Bodkin preference rights, respectively, when, on June 1, 1912, the former were canceled and the latter allowed by the local land officers. And the reasons for so doing appear in a decision of the depart-

ment in the case of Edwards vs. Bodkin, decided May 27, 1913, wherein the department seeks to justify such action in the following opinion:

Edwards vs. Bodkin (42 L. D., 172.)

“William B. Edwards has appealed from the decision of the Commissioner of the General Land Office, dated November 21, 1912, rejecting his homestead application for the N. E. $\frac{1}{4}$ Sec. 11, T. 7 S., R. 22 E., S. B. M., Los Angeles, California, land district, under the act of February 8, 1908 (35 Stat., 6).

“The material facts in the case, as disclosed by the record are as follows:”

Then follows a statement of the facts as herein shown by the bill of exceptions, and after quoting section six of the regulations of January 12, 1909, the decision continues as follows:

“The preference right of entry conferred by the act of May 14, 1880, *supra*, upon any person who ‘has contested, paid the land office fees, and procured the cancellation’ of a homestead entry is a *statutory right which the land department is without authority to deny or disregard by regulations or otherwise. See Beach vs. Hansen (40 L. D., 607.)* (Italics ours.)

“The regulations of January 19, 1909, *supra*, were intended to apply to lands under *proper withdrawals for public use* and for the protection of public interests. *But where, as in this case, it is found that a withdrawal was made under a misapprehension of fact, said regulations could have no further effect than to postpone*

the exercise of the preference right until the lands were restored to public entry." (Italics ours.)

* * * * *

"The Department has given careful consideration to the claims on behalf of Edwards, that he has made *bona fide* settlement on the land and has largely reclaimed the same from its desert state. As has been stated, this Department is without authority, as well as without disposition, to disregard the preference right of entry, duly earned by Bodkin under the law."

The foregoing quotations comprise all the reasons advanced by the Department for its action in recognizing Bodkin's contest and his preference right awarded by the Commissioner June 25, 1909 (and afterwards, for some inexplicable reason), again awarded by the Secretary of the Interior on April 19, 1910, (Tr., p. 84)), as against the Edwards settlement of April 18, 1910, and homestead entry of May 18, 1910, and the reasons are all embraced within the one sentence therein namely: "But where, as in this case, it is found that a withdrawal was made under a misapprehension of fact, said regulations could have no further effect than to postpone the exercise of the preference right until the lands were restored to public entry;" an excuse or reason which we claim is purely arbitrary, and based upon a purely arbitrary assumption.

And this Honorable Court will recall also that this identical reason was given for the decision in the Beach vs. Hansen case, *supra*, on the same arbitrary assumption as to the Yakima Project. In short the Depart-

ment arbitrarily assumes that although lands have been duly and legally withdrawn from all forms of public entry under the reclamation act (that is under the first form), if they are afterwards restored to public entry, it must necessarily follow that the withdrawal was made “under a misapprehension of fact,” and that all the law and all the rules and regulations governing such withdrawn lands become ineffectual and inapplicable as to preference rights awarded during such withdrawals.

That such a theory is arbitrary and untenable is demonstrated by the whole theory of the reclamation act itself, especially by its terms conferring power of withdrawal on the Secretary of the Interior. Section 3 of that act provides: (32 Stat., 388).

“That the Secretary of the Interior shall, before giving the public notice provided for in section 4 of this act, withdraw from public entry the lands required for any irrigation works contemplated under the provisions of this act, *and shall restore to public entry any of the lands so withdrawn* when, in his judgment, such lands are not required for the purposes of this act.” (Italics ours.) And section 4 of the act provides: “That upon the determination by the Secretary of the Interior that any irrigation project is practicable, he may cause to be let contracts, etc.”

The Department itself has always recognized the uncertainty of these reclamation withdrawals, and in that regard clearly expressed itself in its circular of February 6, 1913 (42 L. D., 349), wherein it is said:

“10. The withdrawals of the lands at first is prin-

cipally for the purpose of making surveys and irrigation investigations in order to determine the feasibility of the plans of irrigation and reclamation proposed. Only a portion of the lands will be irrigated even if the project is feasible, but it will be impossible to decide in advance of careful examination what lands may be watered, if any, and the mere fact that surveys are in progress is no indication whatever that the works will be built. It cannot be determined how much water there may be available, or what lands can be covered, or whether the cost will be too great to justify the undertaking until the surveys and the irrigation investigations have been completed."

As the decision of this case of *Edwards vs. Bodkin* is based upon the authority of the *Beach vs. Hansen* case, it is proper for us to again remind this court that the latter case was decided upon the same theory of a "misapprehension" as advanced herein, and also on the authority of the case of *Wright vs. Francis*, which we demonstrated did not support the theory but rather proved its falsity. And we might add that if the Department, when writing the opinion in the *Edwards* case, had added the words "or extend beyond the statutory limit of thirty days after notice," to the sentence "The preference right of entry * * * * * is a statutory right which the land department is without authority to deny or disregard," it would have correctly defined the right, and therefore would have been obliged to disregard the *Bodkin* preference right application.

As to the theory of the withdrawal herein having

been made under a "misapprehension of fact," (a theory which apparently emanates solely from the secret mind of the Department,) the conclusion of the Department, drawn thereon in these decisions is negatived and destroyed by the decision of the Supreme Court of the United States in *Wolsey vs. Chapman* (101 U. S., 755,) wherein it is held *that a withdrawal by the proper executive of the government was sufficient to defeat a settlement for the purpose of pre-emption while the order was in force, "notwithstanding it was afterwards found that the law by reason of which this action was taken did not contemplate such a withdrawal."* (Italics ours.) The Department itself has cited and quoted the above decision in the case of *Woodcock* (38 L. D., 349,) wherein it was expressly held that the motives or purposes of the officer making a withdrawal could not be attacked and that whether or not a particular tract of land is or will be required or used in the construction of irrigation works is a question to be determined by the Secretary, and until he reaches a determination of that question, the Reclamation Act authorizes him to withhold the lands from appropriation and disposition.

Furthermore the sanctity given to the preference rights awarded in the *Beach vs. Hansen* case, and to *Ocheltree* and *Bodkin* herein, is not recognized by the Department in its decision of January 29, 1912, in the case of *Henry A. Schroeder* (40 L. D., 458,) wherein it is decided:

"It has been held by the Department that the right given under the Statute (Act of May 14, 1880,) is in the

nature of a reward to an informer, but it cannot be construed to give him any pecuniary right as contended for in this appeal. The entryman in this case is *entitled to a period of thirty days from notice of cancellation of said entry within which to apply to enter the land.*” (Italics ours.)

We must beg the indulgence of this honorable court for the prolixity of the foregoing review of the instructions, regulations and decisions of the Land Department, but it seemed necessary, owing not only to the importance of learning the construction placed by that executive department upon the statute creating this preference right, but because there have been no decisions of law courts upon the precise question herein. And indeed we have been able to find but two court decisions which apparently are similar or analogous to the case at bar, and those we now present to the court.

Riley vs. Welles, (76 U. S., 19 L. Ed., 648.

The Supreme Court of the United States in Riley vs. Welles, has rendered a decision which we think is analogous to the case at bar, and supports our contention that the act of the local land officials of June 1, 1912, was without jurisdiction and void. That decision is in part as follows:

“In the present case the defendant claims title under, and in pursuance of, the Pre-emption Act of September 4, 1841. Her husband took possession of the lot in 1855, and she was permitted by the register to prove up her possession and occupation, May, 1862. The patent was issued October 15, 1863. It will appear from the

case of Wolcott vs. The Des Moines Co. (*supra*) that the tract of land, of which the lot in question was a part, had been withdrawn from sale and entry on account of a difference of opinion among the officers of the Land Department as to the extent of the original grant, by Congress, of lands in aid of the improvement of the Des Moines river, from the year 1846 down to the resolution of Congress of March 2, 1861, and the Act of July 12, 1862, which acts we held, confirmed the title in the Des Moines Company. As the husband of the plaintiff entered upon the lot in 1855 without right, *the permission of the Register to prove up the possession and improvements, and to make the entry under the pre-emption laws, were acts in violation of law and void*, as was also the issuing of the patent.” (Italics ours.)

Whitehill vs. Victorio Land and Cattle Co.

139 Pac. Rep., 184.

This cause decided February 11, 1914, by the Supreme Court of New Mexico, was an action wherein Mary Bell Whitehill, appellee therein, brought suit against the Victorio Land & Cattle Co., appellant, for damages for trespass by cattle upon certain lands claimed by appellee under a desert land entry. The testimony showed that on May 6, 1911, appellee filed her desert land entry declaration in the U. S. Land Office on certain lands, a portion of which, 40 acres in extent, had at the time been reserved by the government, for which reason this portion of the desert land entry was afterwards canceled, but not until after the trespass complained of was committed; the trespass com-

plained of having occurred between July 20, and August 4, 1911, while the cancellation was made October 17, 1911.

After stating the facts, the court through Mr. Justice Hanna, said:

“The first error assigned and presented for the consideration of this court, is based upon a refusal of the District Court to instruct the jury that plaintiff could not recover for injuries to that portion of the lands covered by plaintiff’s desert entry, which was subsequently canceled. * * * * * * * * * *

It is contended by the appellant that, the subdivision of plaintiff’s entry not being subject to entry, the receiving and allowing of entry by officers of the local land office was without authority, and therefore void. On the other hand, appellee contends that an entry of land valid on its face, constitutes such an appropriation and withdrawal of the land as to segregate it from the public domain and appropriate it to private use, and, even though the entry may be in fact invalid, no lawful entry or settlement can be made on the land by another person. With this contention we agree, and we find the principle supported by the following well considered authorities. (Cases cited.)

“We do not overlook appellant’s contention that the rule referred to is applicable only to cases where the entries or filings are valid when made, or at least are only voidable by reason of facts not apparent upon the records; and that, in the case under present consideration, the same records by which were proved the making of the entry showed a portion of the land included therein had

been heretofore reserved, for which reason the land was not subject to entry, and as to that portion reserved, the entry was void.

o * * * *

“We are not to consider the question as one arising between the government and the entryman, but as affecting the status of the entry at the time of the alleged trespass by appellant. It would seem to turn upon the point of whether a portion of the entry was void or was voidable, by reason of the pre-existing reservation. It is apparent that the officials of the land office have, in the matter of the cancellation of that portion of the entry canceled, pursued a course which, it may be argued, recognized the entry as one of *prima facie* validity.

“The withdrawal of the land was a fact peculiarly within the knowledge of the officials of the land office. The fact that the officers of the land office were in error in overlooking an order of withdrawal of the land from entry would not, as a matter of first impression, make the entry void, but rather voidable, upon the question being raised by the party entitled to raise it; *i. e.*, the government. The cases cited, *supra*, are those where latent defects exist; the entry being, so far as could be known at the time of making, *prima facie* valid but investigation subsequently developing that the entryman was disqualified to make the entry, or had perpetrated fraud, conditions to be discovered by evidence dehors the record, and being essentially questions of fact.

“It has long been settled that as to matters of fact,

within the scope of the authority of the officers of the land department of the United States, their findings must be taken as conclusive, in the absence of fraud and mistake, upon the principle of estoppel by former adjudication. (Cases cited.)

“If the reservation of the land in question from entry is a question of fact, to be determined by the land officials, then the District Court would be concluded by the finding of the officials, as evidenced by the acceptance of the entry, and no error could now be predicated upon the refusal of that court to instruct the jury that plaintiff could not recover for injuries to that portion of the land reserved from entry. If the reservation from entry, however, deprived the officials of all jurisdiction over the land, and left them devoid of authority to consider a filing upon the land reserved, then the acceptance of the entry would be without jurisdiction and absolutely void, all of which could be inquired into in an action at law.

“No cases in point have been cited, nor have we been able to find any, where the facts were analogous to those now before us. * * * But it is also equally true that when by Act of Congress a tract of land has been reserved from homestead and pre-emption, or dedicated to any special purpose, proceedings in the land department in defiance of such reservation or dedication, although culminating in a patent, transfer no title, and may be challenged in an action at law. In other words, the action of the land department cannot override the

expressed will of Congress, or convey away public lands in disregard or defiance thereof.

Smelting Co. vs. Kemp, 104 U. S., 636-646
(and other cases).

* * * *

“Were the present case one where a reservation had been made by Act of Congress, there would be no question but the authorities last cited would be analogous and controlling upon this court. What distinction can there be, however, as a matter of principle, between a reservation from homestead of certain lands by Act of Congress, and a reservation from entry of lands by executive proclamation or departmental withdrawal? Is not the jurisdiction of the land department as effectively cut off in the one case as in the other?

* * * *

“Our inquiry is thus limited to the question of the power of the local land office officials to accept and give validity to an entry upon lands reserved from entry by the government, when the reservation is shown upon the records of the land office.

* * * *

“The question now under consideration was referred to by Mr. Justice Field in *Smelting Co. vs. Kemp*, 104 U. S., 636, at page 641 (26 L. Ed., 875, when he said:

“Of course, when we speak of the conclusive presumptions attending a patent for lands, we assume that it was issued in a case where the department had jurisdiction to act and execute it; that is to say, in a case

where the lands belong to the United States, and provisions has been made by law for their sale. If they were never public property or had been previously disposed of, or if Congress had made no provision for their sale, or had reserved them, the department would have no jurisdiction to transfer them, and its attempted conveyance of them would be inoperative and void, no matter with what seeming regularity the forms of law may have been observed. The action of the department would in that event be like that of any other special tribunal not having jurisdiction of a case which it had assumed to decide. Matters of this kind, disclosing a want of jurisdiction, may be considered by a court of law. In such cases the objection to the patent reaches beyond the action of the special tribunal, and goes to the existence of a subject upon which it was competent to act.'

"In a proceeding entitled 'John Campbell,' before the Secretary of the Interior (6 Land Dec. Int., 317), it was held that: 'The President is vested with general authority in the matter of reserving land for public use, and land as set apart is not subject to disposition under the public land laws during the existence of such reservation.'

See also, John C. Irwin, 6 Land Dec. Dept. Int., 585.

"It is a settled rule of decision in the federal courts that, so long as an executive withdrawal of public lands continues in force, the lands covered thereby are no

subject to entry, and no lawful settlement on them can be acquired.”

Wolsey vs. Chapman, 101 U. S., 755, 25 L. Ed., 915.

Bullard vs. Railroad, 122 U. S., 167, 7 Sup. Ct., 1140, 30 L. Ed., 1123.

Spencer vs. McDougal, 159 U. S., 62, 15 Sup. Ct., 1026, 40 L. Ed., 76.

“In conclusion, therefore, we are of the opinion that an attempted exercise of jurisdiction by the Land Department in the acceptance of an entry, including lands reserved from entry by the government, when the reservation from entry appears as a matter of record in the land office, is void, as to the lands reserved, for the reason that it is an assumption of power in excess of its jurisdiction, and the same can be shown by a defendant in an action at law.

“We conclude that the District Court committed error in refusing the instructions asked by appellant.”

Applying the law enunciated in the two foregoing cases, to the facts of the case at bar, it would necessarily follow that the land department exceeded its jurisdiction in assuming to award a preference right of entry to a successful contestant of an entry on lands withdrawn from all forms of entry, and in giving validity to such so-called preference right, long after the statutory thirty days period after notice, by receiving and allowing the entry of Ocheltree and the entry of Bodkin, based on such preference right. It follows that the action of the local land officials on June 1, 1912, in receiving and

allowing such entries was without jurisdiction and void, and therefore, neither created nor conferred any right on Ocheltree or Bodkin, which was, or is, embraced in, or protected by, Section 19, of the Penal Code of the United States. It follows that the District Court erred in refusing the instruction requested by the plaintiffs in error, and in giving the two instructions hereinbefore noted and set forth in the assignment of errors herein. (Tr., pp. 91-93.)

It is conceded by all that during the period of withdrawal of lands under a first form reclamation withdrawal, no person can gain any rights under the land laws over any of such lands by settlement thereon. The Land Department recognizes and enforces this rule. (Case of Woodcock, *supra* 38 L. D., 349.) That being the case, how can a person obtain a right over the same land, while it is so withdrawn, by means of a contest of an entry thereon, and the preference right awarded as a result thereof? As long as the land remains withdrawn the preference right is "futile," it merely exists in theory, because it cannot be exercised so as to initiate title. Its life according to law is thirty days after notice. If not exercised within that time it expires, and there is no authority vested in the land department to prolong its legal existence, either by "suspension," as held in the case of Fairchild vs. Eby, nor by "reviving" it by a finding that the lands were withdrawn under a "misapprehension of facts," as held in the cases of Beach vs. Hansen, and Edwards vs. Bodkin.

If the settler who settles on the land itself, while still

withdrawn, and who is still settled on it when it is restored, can neither claim nor be granted any right whatever to enter said lands under the land laws by virtue of such settlement, superior to any other qualified citizen, how can one, who has a defunct preference right, claim or receive a right of entry by virtue thereof, which is recognized by law, or within the jurisdiction of the Land Department?

The same Act of May 14, 1880, which creates the preference right resulting from successful contest, with which we are herein dealing, also creates another preference right which is awarded to a settler.

“Sec. 3. That any settler who has settled, or who shall hereafter settle, on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application and perfect his original entry in the United States Land Office as is now allowed to settlers under the pre-emption laws to put their claims on record, and his right shall relate back to the date of settlement the same as if he settled under the pre-emption laws.”

This settlers' preference right is fully recognized by the land department, as evidenced by its suggestions to homesteaders issued March 26, 1913, wherein these instructions are given.

“3. Claims under homestead laws may be initiated either by settlement on surveyed or unsurveyed lands of the kind mentioned in the foregoing paragraph, or by

the filing of a soldier's or sailor's declaratory statement, or by the presentation of an application to enter any surveyed lands of that kind."

"Settlement is initiated through the personal act of the settler placing improvements upon the land, or, establishing residence thereon; he thus gains the right to make entry for the land as against other persons. *

* * * Entry should be made within three months after settlement upon surveyed lands, or within that time after the filing in the local land office of the plat of survey of lands unsurveyed when settlement was made. Otherwise, the preference right of entry may be lost."

While we are not herein trying the private contests between the plaintiffs in error and Ocheltree and Bodkin, as to which have superior rights to the lands involved, yet it is interesting, as well as helpful, in arriving at a correct solution of the question herein to view the exact situation as it was presented to the land department when it rejected the entries of Culpepper and Edwards, and denied their preference rights as settlers, on June 1, 1912, at the same time giving validity to the so-called preference rights of Ocheltree and Bodkin by receiving and accepting their entries.

The entries of the former were *prima facie* valid as their declarations showed settlement after restoration and prior and down to entry. While the entries of the latter were *prima facie* void as shown by the records before the land office. And the action of the local land officers in giving them validity by receiving and allow-

ing them in the face of the records, was without jurisdiction and absolutely void, and hence no rights accrued to either Ocheltree or Bodkin, by reason thereof, which are embraced in, or protected by, section 19 of the Penal Code, and the District Court should have so instructed the jury.

We respectfully submit that the so-called preference rights of Ocheltree and Bodkin were void on May 18, 1910, and for some time prior thereto; that the local land officials exceeded their jurisdiction in receiving and allowing the Ocheltree and Bodkin entries thereunder on May 18, 1910; and further exceeded their jurisdiction in allowing their application on June 1, 1912, to enter the lands involved, as homesteads, respectively, under and by virtue of said preference rights; that such action by the local land officials was absolutely void and conferred no right on said Ocheltree or said Bodkin to make settlement or residence on the respective lands, and to cultivate the same so as to earn title to said lands, nor any right, embraced in, or protected by, section 19 of the Penal Code of the United States, under which the indictment herein is found.

Respectfully submitted.

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Attorneys for Plaintiffs in Error.

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United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

William B. Edwards and Robert
L. Culpepper,

Plaintiffs in Error,

vs.

The United States of America,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

ALBERT SCHOONOVER,
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Assistant U. S. Attorney.

CLYDE R. MOODY,
Assistant U. S. Attorney.

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United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

**William B. Edwards and Robert
L. Culpepper,**

Plaintiffs in Error,

vs.

The United States of America,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

I. STATEMENT OF THE CASE.

The statement of the case contained in the brief for plaintiffs in error, on pages 3 and 4, is substantially correct. It will be seen from that statement that the only errors assigned are (1) the refusal to give plaintiff's requested instruction [Tr. pp. 51-2, 91], and (2) the giving by the court of the instruction as shown in the transcript, pages 50, 92, and (3) the error of the court in giving the instruction shown in the transcript, pages 51, 93.

It will further be seen from the statement of the case and from the brief of plaintiffs in error that the only question raised by these assignments of error is as follows:

Section 2 of the Act of May 14, 1880 (21 Stats. 140), provides as follows:

“Sec. 2. In all cases where any person has contested, paid the land office fees, and procured the cancellation of any pre-emption, homestead, or timber culture entry, he shall be notified by the register of the land office of the district in which such land is situated of such cancellation and shall be allowed thirty days from date of such notice to enter said lands.”

By the Act of June 17, 1902, called the “Reclamation Act” (32 Stats. 388), Congress gave to the Secretary of the Interior power to withdraw from public entry lands required for irrigation work contemplated under the provisions of the act, and to restore to public entry any of the lands so withdrawn when in his judgment such lands are not required for the purposes of the act; and the Secretary of the Interior is also authorized at or immediately prior to the time of beginning surveys for any contemplated irrigation work, to withdraw from entry, except under the Homestead Laws, any public lands believed to be susceptible of irrigation from said work.

Now, if a person contested, paid the land office fees, and procured the cancellation of any pre-emption, homestead or timber culture entry and was notified by the register of the land office of the district in which said land was situated of said cancellation, he would be allowed by the Act of May 14, 1880 (12 Stats. 140), the preference right of thirty days from the date of said notice to enter said land. But if, at the time he instituted his contest and at the

time he won his contest and was notified that the person's entry against whom he contested had been canceled, the lands had been withdrawn from entry by the Secretary of the Interior acting under the authority of the Reclamation Act of June 17, 1902 (32 Stats. 388), thus making it impossible for the successful contestant to exercise his preference right as granted him by the Act of May 14, 1880, within the thirty days as specified in said act, would he thereby lose the benefits of his contest or would his preference right be suspended until such time as the lands were reopened for entry, and would he have thirty days from the date on which the lands were thrown open to entry within which to exercise his preference right?

The Secretary of the Interior has decided, in a number of decisions which will be hereafter cited and quoted, that the preference right thus gained would be so suspended. Counsel for plaintiffs in error contend that the preference right would not be so suspended and that the decisions of the Secretary of the Interior to that effect are erroneous.

It will be noted from the statement of facts [Tr. p. 83] that J. M. Ocheltree received his preference right on September 30, 1908, and that Patrick H. Bodkin received his preference right on the 19th day of April, 1910. [Tr. p. 84.] It will further be noted that the instructions given by the court to the jury [Tr. p. 80], in which defendants allege error, do not touch upon the preference rights of said Ocheltree and Bodkin, the court simply instructing the jury that Ocheltree, by virtue of the allowance of his entry on June 1, 1912, by the United States Land Office, and the said Bodkin

by virtue of the allowance of his entry on June 1, 1912, by the United States Land Office, thereby secured the right by the Constitution and laws of the United States to make settlement and residence upon the lands as described in the indictment, and to cultivate the same and in other respects comply with the public land laws of the United States relating to homesteads, so as to earn and procure title to said lands. These instructions were given by the trial court undoubtedly with the view that the decisions of the Land Department granting to the said Ocheltree and Bodkin the right to enter the said lands as homesteads, could not be collaterally attacked in a criminal case. That is, that the court in the trial of a criminal case would not collaterally inquire into the grounds upon which a decision of the officers of the Land Department had been rendered.

This, therefore, is the first contention by the defendant in error in support of the judgment of the trial court.

POINTS, AUTHORITIES AND ARGUMENT OF DEFENDANT IN ERROR.

PROPOSITION NO. 1.

A decision rendered by the officers of the Land Department upon a question of fact is undoubtedly conclusive, and not subject to be reviewed by the courts in absence of a showing that such decision was rendered in consequences of fraud or the entire lack of evidence, and can be attacked only in a court of equity

by a direct proceeding for that purpose and not by a collateral proceeding.

This proposition is so firmly established in our law that it would seem hardly necessary to cite authorities in support of it. The following is a list of a few of the leading cases by the various courts of the United States upon this proposition:

In 232 U. S. 110, 116, 117, in the case of *Ross v. Day*, Mr. Justice Pitney says, in part, as follows:

“In *Whitcomb v. White*, 214 U. S. 15, 16, this court, speaking by Mr. Justice Brewer, said: ‘The decision of the Land Department was not rested solely upon the fact that White’s formal application was filed a few hours before that of the trustee for the occupants of the townsite, but rather chiefly upon the priority of the former’s equitable rights. So far as such decision involves questions of fact it is conclusive upon the courts.’ (*Johnson v. Towsley*, 13 Wall. 72, 86; *Shepley v. Cowan*, 91 U. S. 330, 340; *Marquez v. Frisbie*, 101 U. S. 473, 476; *Quinby v. Conlan*, 104 U. S. 420, 425, 426; *Burfenning v. C., St. P., M. & O. Ry.*, 163 U. S. 321, 323; *De Cambra v. Rogers*, 189 U. S. 119, 120.) And this rule is applied in cases where there is a mixed question of law and fact, unless the court is able to so separate the question as to see clearly what and where the mistake of law is. As said by Mr. Justice Miller in *Marquez v. Frisbie*, *supra* (101 U. S. 473), p. 476: ‘This means, and it is a sound principle, that where there is a mixed question of law and of fact, and the court cannot so separate it as to see clearly where the mistake of law is, the decision of the tribunal to which the law has con-

fided the matter is conclusive.' And see *Moore v. Robbins*, 96 U. S. 530, 535; *Gonzales v. French*, 164 U. S. 338."

See also:

Vance v. Burbank, 101 U. S. 514, 519;

Lee v. Johnson, 116 U. S. 48;

Gertgens v. O'Connor, 191 U. S. 237, 240;

Hartwell v. Havighorst, 196 U. S. 635;

Potter v. Hall, 189 U. S. 292, 300;

Whitcomb v. White, 214 U. S. 15;

Logan v. Davis, 233 U. S. 613, 623, and cases cited;

Southern Development Co. v. Endersen, 200 Fed. 272, 278, 280, 281;

Sullivan v. Damon, 202 Fed. 285;

West v. Rutledge Timber Co., 210 Fed. 189.

And see also:

32 Cyc. 1020 (note 38 and cases cited thereunder).

It is equally as well settled by the decisions that the courts cannot exercise any direct appellate jurisdiction over the rulings of the officers of the Land Department, nor can they reverse or correct such rulings in collateral proceedings between private parties, but the decisions of the Land Department are subject to review by the court to the extent that where the department has fallen into error and denied to parties the rights to which they are entitled by the Constitution or laws of the United States, the courts can, *in a proper proceeding*, interfere and refuse to give effect

to the action of the department, or set aside or correct its decisions as *equity* may require. But even this cannot be done until after the title has passed from the government. A decision of the Land Department in a contest will be sustained by the courts unless there are clear and cogent reasons for overthrowing it and unless it appears that there has been a clear misapplication of the law to the facts, and even a *court of equity* will not inquire into any question of a misapplication of the law by the officers of the Land Department to a controverted question of fact before them unless the findings of fact and conclusions of such officers are set out fully in the pleadings of the complaining party. In other words, defendant in error contends that the following authorities absolutely hold that the courts will not collaterally attack a decision of the officers of the Land Department even on a question of law, and that the only method by which a decision of the officers of the Land Department can be attacked is by a direct attack in a court of equity, and that even then a court of equity is slow to correct the rulings of the Land Department:

The Circuit Court of Appeals for the 8th Circuit in the case of *King v. McAndrews et al.*, 111 Fed. 860, says as follows (quoting from p. 864 of the opinion):

“The remedy for an error of law in the action of the department regarding the title to land intrusted to its disposition is by a direct proceeding by a bill in equity to correct it. *James v. Iron Co.*, 46 C. C. A. 476, 107 Fed. 597, 600; *Bogan v. Mortgage Co.*, 63 Fed. 192, 195, 11 C. C. A.

128, 130, 27 U. S. App. 346, 350; U. S. v. Winona & St. P. R. Co., 67 Fed. 948, 958, 15 C. C. A. 96, 106, 32 U. S. App. 272, 288; U. S. v. Northern Pac. R. Co., 95 Fed. 864, 870, 37 C. C. A. 290, 296; Cunningham v. Ashley, 14 How. 377, 14 L. Ed. 462; Barnard v. Ashley, 18 How. 43, 15 L. Ed. 285; Garland v. Wynn, 20 How. 6, 15 L. Ed. 801; Lytle v. Arkansas, 22 How. 193, 16 L. Ed. 306; Lindsey v. Hawes, 2 Black 554, 562, 17 L. Ed. 265; Johnson v. Towsley, 13 Wall. 72, 85, 20 L. Ed. 485; Moore v. Robbins, 96 U. S. 530, 538, 24 L. Ed. 848; Bernier v. Bernier, 147 U. S. 242, 13 Sup. Ct. 244, 37 L. Ed. 152. * * *

“These established principles have been restated and these authorities have been again cited because they control the disposition of the case in hand, and because counsel for the defendants seem to be impressed with the view that every decision by the Land Department of the many grave and complicated issues which condition the rightful issue of a patent is a mere ministerial act, open to collateral attack for every error of law into which the officers of that department may fall, in every action at law in which the title under the patent is involved. 104 Fed. 432. Such is not the law. The decisions of that department are judicial acts. The patents it issues are judgments of a quasi judicial tribunal. In cases within its jurisdiction they are presumptively right, and as impervious to collateral attack for errors of law or for mistakes of fact as the judgments of the courts, and all cases are within the jurisdiction of this department in which Congress has intrusted to it the determination of the rights of the claimants, and the disposition of the land in accordance with its decision.”

In the case of *Emmons v. U. S.*, 175 Fed. 514, the Circuit Court of the District of Oregon, in an opinion by Judge Wolverton, holds in part as follows:

“It has become well settled that the Land Department, in passing upon matters of fact, within the scope of its jurisdiction to hear and determine questions relating to the sale and disposal of the public lands, acts judicially, and that its findings and judgments become conclusive and binding, as the judgments and decrees of courts of general jurisdiction are conclusive and final, and are preclusive of the matters adjudicated in all other proceedings. I quote from *Smelting Company v. Kemp*, 104 U. S. 636, 640, 26 L. Ed. 875:

“‘In that respect they (the officers of the Land Department) exercise a judicial function, and, therefore, it has been held in various instances by this court that their judgment as to matters of fact, properly determinable by them, is conclusive when brought to notice in a collateral proceeding. Their judgment in such cases is, like that of other special tribunals upon matters within their exclusive jurisdiction, unassailable except by a direct proceedings for its correction or annulment.’

“The doctrine is again affirmed in its fullest import, in *Noble v. Union River Logging Railroad*, 147 U. S. 165, 13 Sup. Ct. 271, 37 L. Ed. 123, where numerous authorities are cited in its support. Now, if it be, as is alleged in the answer, that the adjudication of the Land Department in canceling the entries of Graham, Jones and Steinhardt, proceeded upon the ground that they were obtained, not in good faith, but in fraud of the government, then the judgment of the department

is conclusive of the fact, and plaintiff cannot get behind it here. This proceeding is entirely collateral to the proceeding under which it was sought to acquire the title to these lands, and in which the entries were canceled, and hence the regularity of that proceeding cannot be questioned in a cause of this nature.”

Also, in the case of *James et al. v. Germania Iron Company*, the Circuit Court of Appeals, 8th Circuit, 107 Fed. 597, in an opinion by Judge Sanborn, held:

“The Land Department of the United States is a *quasi* judicial tribunal, invested with authority to hear and determine claims to the public land subject to its disposition, and its decisions of the issues presented at such hearings are impervious to collateral attack and presumtively right. A patent to land of the disposition of which the department has jurisdiction, is both the judgment of that tribunal and a conveyance of the legal title to the land. 9 Stats. 395, c. 108, sec. 3; Rev. Stats. secs. 441, 453; *U. S. v. Winona & St. P. R. Co.*, 67 Fed. 948; 32 U. S. App. 272.”

And also, in the case of *King v. McAndrews et al.*, 111 Fed. 860, the Circuit Court of Appeals for the 8th Circuit, through Judge Sanborn, said in part as follows:

“The Land Department of the United States, including in that term the Secretary of the Interior, the commissioner of the general land office and their subordinate officers, constitutes a special tribunal vested with judicial power to hear and determine the claims of all parties to the public lands which it is authorized to dispose of and with

power to execute its judgments by conveyances to the parties entitled to them. 9 Stats. 395, c. 108, sec. 3; 5 Stats. c. 352, sec. 1.

“A patent of land within its jurisdiction issued by the Land Department is a judgment of that tribunal and a conveyance of legal title to the land to the patentee in execution of the judgment.

“When such a patent to land within the jurisdiction of the department is issued, it is, like the judgments of other judicial tribunals, impervious to collateral attack. * * *

“But land which the department is vested with the power and charged with the duty to hear and decide the claims of applicants for, and to dispose of in accordance with its decision, is within its jurisdiction, and its patent of such land conveys the legal title to it, and is impervious to collateral attack, whether its decision is right or wrong. *Minter v. Crommelin*, 18 How. 87, 89, 15 L. Ed. 279; *U. S. v. Schurz*, 102 U. S. 378, 401, 26 L. Ed. 167; *Moore v. Robbins*, 96 U. S. 530, 533, 24 L. Ed. 848; *French v. Fyan*, 93 U. S. 169, 172, 23 L. Ed. 812; *Quinby v. Conlan*, 104 U. S. 420, 26 L. Ed. 800; *Refining Co. v. Kemp*, 104 U. S. 636, 645-647, 26 L. Ed. 875; *Steel v. Refining Co.*, 106 U. S. 447, 450, 452, 1 Sup. Ct. 389, 27 L. Ed. 226; *Lee v. Johnson*, 116 U. S. 48, 49, 6 Sup. Ct. 249, 29 L. Ed. 570; *Heath v. Wallace*, 138 U. S. 573, 585, 11 Sup. St. 380, 34 L. Ed. 1063; *Knight v. Association*, 142 U. S. 161, 212, 12 Sup. Ct. 258, 35 L. Ed. 974; *Noble v. Railroad Co.*, 147 U. S. 174, 13 Sup. Ct. 271, 37 L. Ed. 123; *Barden v. Railroad Co.*, 154 U. S. 288, 327, 14 Sup. Ct. 1030, 1038, 38 L. Ed. 992, 1001. In the case last cited the Supreme Court said:

“‘It is the established doctrine, expressed in numerous decisions of this court, that wherever Congress has provided for the disposition of any portion of the public lands, of a particular character, and authorizes the officers of the Land Department to issue a patent for such land, upon ascertainment of certain facts, that department has jurisdiction to inquire into and determine as to the existence of such facts and, in the absence of fraud, imposition, or mistake, its determination is conclusive against collateral attack.’”

And the same holding was also made in the case of *Howe et al. v. Parker et al.*, 190 Fed. 738.

Mr. Justice Field, in the case of *Quinby v. Conlan*, 104 U. S. 420, says, in part:

“The laws of the United States prescribe with particularity the manner in which portions of the public domain may be acquired by settlers. They require personal settlement upon the lands desired and their inhabitation and improvement, and a declaration of the settler’s acts and purposes to be made in the proper office of the district, within a limited time after the public surveys have been extended over the lands. By them a land department has been created to supervise all the various steps required for the acquisition of the title of the government. Its officers are required to receive, consider, and pass upon the proofs furnished as to the alleged settlements upon the lands, and their improvement, when pre-emption rights are claimed, and, in case of conflicting claims to the same tract, to hear the contesting parties. The proofs offered in compliance with the law are to be presented, in the first instance,

to the officers of the district where the land is situated, and from their decision an appeal lies to the Commissioner of the General Land Office, and from him to the Secretary of the Interior. For mere errors of judgment as to the weight of evidence on these subjects, by any of the subordinate officers, the only remedy is by an appeal to his superior of the department. The courts cannot exercise any direct appellate jurisdiction over the rulings of those officers or of their superior in the department in such matters, nor can they reverse or correct them in a collateral proceeding between private parties.

“In this case the allegation that false and fraudulent representations, as to the settlement of the plaintiff, were made to the officers of the Land Department is negatived by the finding of the court. It would lead to endless litigation, and be fruitful of evil if a supervisory power were vested in the courts over the action of the numerous officers of the Land Department, on mere questions of fact presented for their determination. It is only when those officers have misconstrued the law applicable to the case, as established before the department, and thus have denied to parties rights which, upon a correct construction, would have been conceded to them, or where misrepresentations and fraud have been practiced, necessarily affecting their judgment, that the courts can, in a proper proceeding, interfere and refuse to give effect to their action. On this subject we have repeatedly and with emphasis expressed our opinion, and the matter should be deemed settled. *Johnson v. Towsley*, 13 Wall. 72; *Shepley v. Cowan*, 91 U. S. 330-340; *Moore v. Robbins*, 96 *Id.* 530.

“And we may also add, in this connection, that the misconstruction of the law by the officers of the department, which will authorize the interference of the court, must be clearly manifest, and not alleged upon a possible finding of the facts from the evidence different from that reached by them. And where fraud and misrepresentations are relied upon as grounds of interference by the court, they should be stated with such fulness and particularity as to show that they must necessarily have affected the action of the officers of the department. Mere general allegations of fraud and misrepresentations will not suffice. *United States v. Atherton*, 102 U. S. 372.

“In the present case the respective claims of the parties to a pre-emptive right to the land in controversy, from their settlement and improvements, had been the subject of earnest contestation before the officers of the Land Department, and a decision in favor of the plaintiff was finally rendered by the Secretary of the Interior. And the question whether the land in controversy had been so freed from its reservation under the Mexican grant as to be open to settlement and pre-emption depended upon matters disclosed by the record of proceedings in the Land Department, namely, that the public surveys had been extended over the land, and that other lands had been appropriated to the satisfaction of the grant.”

Also, in the case of *James v. Germania Iron Company*, heretofore referred to, by the Circuit Court of Appeals for the 8th Circuit, 107 Fed. 597, it was held (quoting from the syllabus, paragraph 5):

“The entry of public land under the laws of the United States, whether legal or illegal, segregates

it from the public domain and appropriates it to private use, and withdraws it from subsequent entry or acquisition until the prior entry is officially canceled and removed.”

This is a direct authority in support of our argument herein to the effect that the witnesses Ocheltree and Bodkin were acting in pursuance to a valid, existing decision of the Secretary of the Interior and that the plaintiffs in error, Edwards and Culpepper, certainly could not resist that valid, existing decision with force and arms in attempting to prevent the entry of the witnesses Ocheltree and Bodkin under and by virtue of that decision and that in so doing the plaintiffs in error, Edwards and Culpepper, were depriving the witnesses Ocheltree and Bodkin of rights guaranteed to them under the Constitution and laws of the United States.

That the Land Department has jurisdiction over the public land of the United States is, of course, unquestioned, and the witnesses Ocheltree and Bodkin, in attempting to make entry upon the land in question, were, therefore, acting in pursuance to existing, valid decisions of the Land Department, and even though those decisions might have been erroneous, as they were rendered by a competent tribunal with jurisdiction, undoubtedly the witnesses Ocheltree and Bodkin had the right, under the Constitution and laws of the United States, to do all the things necessary to carry into effect those decisions, until such time as those decisions, if they were erroneous, were reversed by the courts in a proper direct proceeding. This being

true, the trial court was correct in refusing to give the requested instruction of plaintiffs in error [Tr. p. 78] and was likewise correct in giving the instructions [Tr. p. 80] to which plaintiffs in error took exception.

The entire contention of plaintiffs in error and their entire brief is an effort on their part to have this court, in a collateral proceeding, determine the private contest between the plaintiffs in error and the witnesses Ocheltree and Bodkin by reversing the decisions of the Land Department in those matters. In fact, the brief of seventy-seven pages is so plainly an attempt in that respect that counsel for plaintiffs in error, themselves, seek to apologize for the effort at the close of their brief on page 76, wherein they say:

“While we are not herein trying the private contests between the plaintiffs in error and Ocheltree and Bodkin, as to which have superior rights to the lands involved, yet it is interesting, as well as helpful, in arriving at a correct solution of the question herein, to view the exact situation as it was presented to the Land Department when it rejected the entries of Culpepper and Edwards, and denied their preference rights as settlers, on June 1, 1912, at the same time giving validity to the so-called preference rights of Ocheltree and Bodkin by receiving and accepting their entries.”

The issues as presented by the brief of plaintiffs in error are certainly nothing else other than the determination of the private interests between the plaintiffs in error and the witnesses Ocheltree and Bodkin and as said heretofore the witnesses Ocheltree and Bodkin were acting in pursuance to valid, existing decisions

of the Secretary of the Interior and the plaintiffs in error, Edwards and Culpepper, certainly could not resist those valid, existing decisions with force and arms and then try out the private interests of themselves and the witnesses Ocheltree and Bodkin in this case wherein the said plaintiffs in error, Edwards and Culpepper, are charged with depriving citizens of the United States of the rights guaranteed to them under the Constitution and laws of the United States.

We believe this substantially answers the contention made by plaintiffs in error, and that there is, therefore, no error in the record, and that the judgment of the trial court should be affirmed.

However, if this Honorable Court is of a different opinion, and believes that it was incumbent upon the trial court to inquire into the validity and correctness of the decisions of the Land Department, in reference to the preference rights under which the witnesses Bodkin and Ocheltree were allowed entry by the Land Department, we have to submit the following proposition in support of the decisions of the Land Department:

PROPOSITION No. 2.

The witness Patrick H. Bodkin exercised his preference right within thirty days of notice of the cancellation of the entry he was contesting. In other words, the said Bodkin exercised his preference right within the period prescribed by the Act of Congress of May 14, 1880 (21 Stats. 140).

It will be noted from the transcript [Tr. p. 82], that

the lands referred to in the indictment were withdrawn under the Reclamation Act (32 Stats. 388) on the 12th day of September, 1903, by order of the Land Department. That prior to said withdrawal the land described in count number 2 of the indictment in this case, to-wit, the northeast quarter of section eleven, township seven south, range twenty-two east, San Bernardino Base and Meridian, had been entered by the defendant William B. Edwards under the Homestead Laws of the United States; that thereafter, while the lands described in said count number 2 of the said indictment were still withdrawn from entry, the said Patrick H. Bodkin duly filed a contest in the land office at Los Angeles. [Tr. p. 84.] That hearing was duly had on said contest in the local land office and the contest duly forwarded to the Commissioner of the General Land Office at Washington and by him decided in favor of the said Patrick H. Bodkin on the 25th day of June, 1909, the said Commissioner, by his decision, holding the said homestead entry of the said William B. Edwards *for cancellation*, and that notice of that decision, that is, that the Commissioner held the homestead entry of the said Edwards *for cancellation* was given to the said Patrick H. Bodkin prior to the first day of January, 1910. [Tr. p. 84.] That thereafter the said William B. Edwards took an appeal from said decision of the Commissioner to the Secretary of the Interior and the Secretary of the Interior on the 19th day of April, 1910, made an order canceling the said homestead entry of the said William B. Edwards on said land and awarded to the said Patrick

H. Bodkin a preference right to enter upon said land [Tr. p. 84]; that on the 10th day of January, 1910, by an order duly made and entered by the Land Department the said lands described in count number 2 of said indictment among other lands, were restored to public settlement on April 18, 1910, and to public entry on May 18, 1910 [Tr. p. 84] and that, on May 18, 1910, the said Patrick H. Bodkin filed his application to homestead the said land described in count number 2 of the said indictment on the basis and by virtue of the preference right granted by the Land Department of the United States by the decision of the Secretary of the Interior on the 19th day of April, 1910. [Tr. p. 85.] It will thus be seen from the transcript that so far as count number 2 of the indictment is concerned the said Patrick H. Bodkin having been given notice of the cancellation of the Edwards entry and awarded his preference right on the 19th day of April, 1910, and having made entry on the said land on May 18, 1910, exercised his preference right within the thirty day period as prescribed by the Act of Congress heretofore referred to and that so far as the said count number 2 of said indictment is concerned and the instruction of the court [Tr. pp. 51, 93] referring to the said Patrick H. Bodkin, there was no error even though we grant the contention of the plaintiffs in error.

Counsel for plaintiffs in error have evidently overlooked the fact that the Edwards entry was not cancelled on the 25th day of June, 1909, by the commissioner, but that the Commissioner, by his decision,

merely held the said Edwards entry *for cancellation*. [Tr. p. 84.] The meaning of said decision being simply that in view of the fact that the said Edwards had a right of appeal to the Secretary of the Interior his entry was not canceled but was merely held for cancellation pending his right of appeal and that in view of the fact that he did exercise his right of appeal to the Secretary of the Interior his entry was not finally canceled until the 19th day of April, 1910, on which day his entry was for the first time cancelled, notice of which decision was at that time given to the witness Patrick H. Bodkin.

That instruction of the court in reference to count number 2 of the said indictment [Tr. pp. 51, 93] being the only error assigned by plaintiffs in error in reference to the trial and conviction under said count number 2 of said indictment, it must be held by this court that the conviction and judgment of the court of the defendants on said count number 2 of said indictment must be affirmed.

In support of the judgment of the trial court insofar as count number 1 of said indictment is concerned and of the charge of the court as given under said count number 1 of said indictment [Tr. pp. 50, 92] defendant in error desires to submit the following further propositions:

PROPOSITION No. 3.

Where a period of time is fixed by statute of the government or state, or is fixed by any court, for the performance of any act, and that government, or that

state, or that court, puts some obstacle in the way which shall or does prevent the performing of that act within the time prescribed, then the time for the performance of said act is extended beyond the period fixed by said government, state or court, for the performance of said act, for a time equal in length to the time during which said obstacle was in existence.

This was a rule of common law and has been carried into the statutes of most states. We find it carried into the statutes of California in various places; among others, sections 356, 357 and 358 of the Code of Civil Procedure, section 356 providing, in part, as follows:

“When the commencement of an action is stayed by statutory prohibition, the time of the continuance of the prohibition is not part of the time limited for the commencement of the action,”

and section 357 provides:

“No person can avail himself of a disability unless it existed when his right of action accrued.”

And section 358 provides:

“When two or more disabilities co-exist at the time the right of action accrues, the limitation does not attach until they are removed.”

Therefore, we submit that the decisions of the Secretary of the Interior extending the preference right as granted by the Act of May 14, 1880 (21 Stats. 140) were correct. The Act of May 14, 1880, granted a preference right of thirty days from time of notice to a successful contestant of the winning of his contest when considered in connection with the Reclama-

tion Act of June 17, 1902 (32 Stats. 388), and the actions of the Secretary of the Interior under the authority of that act will demonstrate that principle.

In pursuance of the Reclamation Act of June 17, 1902, the Secretary of the Interior withdrew from public entry the lands described in count number 1 of the indictment in this case. Thereafter said witness Ocheltree duly contested one Danford Arnold and was entitled to a preference right of entry on said lands for thirty days from the 30th day of September, 1908. He could not exercise that right because of the action of the secretary, acting pursuant to the act of Congress, withdrawing the said lands from entry, and, under the rule of law heretofore set forth, the witness Ocheltree was therefore entitled to 30 days from the time the obstacle was removed, that is, thirty days from the time the said lands were restored to entry, and that is what he was given by the decisions of the Secretary of the Interior.

There is still another view under which the decisions of the Secretary of the Interior extending the thirty days preference right beyond the period fixed by the Act of May 14, 1880, and particularly the decision of the Secretary of the Interior in favor of the said witness Ocheltree, can be upheld, which we respectfully submit as Proposition No. 4.

PROPOSITION No. 4.

Where an executive department of the government has exercised certain powers—or rendered certain decisions—for a long number of years which have never been denied, either legislatively or judicially, Congress

will be held to have acquiesced in the action of the executive department.

This proposition is based upon the late case of the *United States v. Midwest Oil Company*, decided by the Supreme Court of the United States, February 23, 1915, construing the validity of the action of the President in withdrawing from private acquisition certain lands which Congress had made free and open to acquisition and purchase. In that case the United States argued that the President, as commander-in-chief of the army and navy, had power to make the order withdrawing said lands, for the purpose of retaining and preserving a source of fuel supply for the navy and that the President, being charged with the care of the public domain, could, by virtue of the executive power vested in him by the Constitution and also in conformity with the tacit consent of Congress, withdraw in the public interest any public land from entry or location by private parties. The appellees, the *Midwest Oil Company et al.*, insisted that there was no dispensing power in the executive, and that he could not suspend a statute or withdraw from entry or location any lands which Congress had affirmatively declared should be free and open to acquisition by citizens of the United States. They therefore insisted that the withdrawal order was absolutely void since it appeared upon its face to be an attempt to suspend a statute.

In a very able opinion by Mr. Justice Lamar, the Supreme Court, among other things, said the following:

“We need not consider whether, as an original question, the President could have withdrawn from private acquisition what Congress had made free and open to occupation and purchase. The case can be determined on other grounds and in the light of the legal consequences flowing from a long continued practice to make orders like the one here involved. For the President’s proclamation of September 27, 1909, is by no means the first instance in which the executive, by his special order, has withdrawn land which Congress by general statute had thrown open to acquisition by citizens, and while it is not known when the first of these orders was made, it is certain that ‘the practice dates from an early period in the history of the government.’ *Griscar v. McDowell*, 6 Wall. 381. Scores and hundreds of these orders have been made, * * * and he has during the past eight years, without express statutory authority—but under the claim of power so to do—made a multitude of executive orders which operated to withdraw public land that would otherwise have been open to private acquisition. (Here were cited a number of instances wherein the President had exercised a like power.)

“It may be argued that while these facts and rulings prove a usage they do not establish its validity. But government is a practical affair, intended for practical men. Both officers, law-makers and citizens naturally adjust themselves to any long continued action of the executive department—on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle but the basis of a wise and quieting rule

that in determining the meaning of a statute or the existence of a power weight shall be given to the usage itself, even when the validity of the practice is the subject of investigation.

“This principle, recognized in every jurisdiction, was first applied by this court in the often cited case of *Stuart v. Laird*, 1 Cranch. 299. There, answering the objection that the Act of 1789 was unconstitutional insofar as it gave circuit power to judges of the Supreme Court, it was said (1803) that ‘practice and acquiescence under it for a period of several years commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled.’

“Again, in *McPherson v. Blacker*, 146 U. S. 1, where the question was as to the validity of the state law providing for the appointment of presidential electors, it was held that as the terms of the provision of the Constitution of the United States left the question of the power in doubt, the ‘contemporaneous and continuous subsequent practical construction would be treated as decisive.’ *Fairbanks v. U. S.*, 181 U. S. 307; *Cooley v. Board of Wardens*, 12 Howard 315. See also *Grizar v. McDowell*, 6 Wall. 364, where, in 1867, the practice of the executive department was referred to as evidence of the validity of these orders making reservations of public land even when the practice was by no means so general and extensive as it has since become.

“These decisions do not, of course, mean that private rights could be created by an officer with-

drawing for a railroad more than had been authorized by Congress in the land grant act. *Southern Pacific v. Bell*, 183 U. S. 685; *Brandon v. Ard*, 211 U. S. 21. Nor do these decisions mean that the executive can by his course of action create a power. But they do clearly indicate that the long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the withdrawals had been made in pursuance of its consent or of a recognized administrative power of the executive in the management of the public lands. 'This is particularly true in view of the fact that the land is property of the United States and that the land laws are not of a legislative character in the highest sense of the term (art. 4, sec. 3), 'but savor somewhat of mere rules prescribed by an owner of property for its disposal.' *Butte City Water Co. v. Baker*, 196 U. S. 126.

"These rules or laws for the disposal of public land are necessarily general in their nature. Emergencies may occur, or conditions may so change as to require that the agent in charge should in the public interest, withhold the land from sale; and while no such express authority had been granted, there is nothing in the nature of the power exercised which prevents Congress from granting it by implication just as could be done by any other owner of property under similar conditions. The power of the executive, as agent in charge, to retain that property from sale need not necessarily be expressed in writing. *Lockhart v. Johnson*, 181 U. S. 520; *Bronson v. Chappell*, 12 Wall. 686; *Campbell v. City of Kenosha*, 5 Wall. 194 (2)."

This case, we believe, absolutely sustains the position of the government as stated in Proposition 4 above, in view of the fact that the Secretary of the Interior and the other officers of the Land Department have, for a long number of years, acting pursuant to the jurisdiction given them over the public lands of the United States and their construction of the public land laws, recognized, by their decisions, the right of a successful contestant who won his contest while land was withdrawn from entry, to thirty days from the time of notice to him that the land was restored to entry within which to exercise the preference right granted to him by Congress. There have undoubtedly been a number of decisions rendered by the Land Department to the above effect which have not been reported, but among the reported cases we find the following, which, by the way, refer only to reclamation withdrawals and the relation of preference rights thereto.

In the case of *Fairchild v. Eby*, 37 Land Dec. 362, decided December 28, 1908, the Secretary of the Interior, among other things, says the following:

“The case is now before this department on appeal, filed by Sherman D. Fairchild, which contends that the contest should not have been entertained in the first instance because said land is within a government reserve and that even if a preference right ever existed in favor of Daniel A. Eby by reason of his contest, it was for thirty days next after notice to him after the cancellation of Spangler’s entry.

“The contention of Fairchild that the contest should not have been allowed would be tenable but for the regulations of the department of June 6, 1905 (33 L. D. 607), the sixth section of which expressly provides for the allowance of contests against any entry covered by a withdrawal for reclamation purposes, whether the withdrawal is of lands for use in the construction and operation of reclamation works, or of lands susceptible to irrigation from such works.

“When a contest is filed under said rule against an entry which is covered by a withdrawal for use by the government, the seventh section of said regulations provides that the land cannot be appropriated by a successful contestant so long as the lands remain withdrawn; ‘but any contestant who gains a preferred right to enter such lands may exercise that right at any time within thirty days from notice that the lands involved have been released from such withdrawal and made subject to entry.’

“It was thus contemplated that the preference right allowed by the sixth section should remain suspended if the land was not subject to entry at the date of cancellation, but that the preference right so acquired might be exercised whenever the land was restored. Whether a contest challenging the validity of any entry should or should not be allowed is a matter resting within executive jurisdiction, but when it has been allowed, and in pursuance thereof the entry has been canceled as the result of such contest, the right of the successful contestant to a preference right of entry of such land whenever it is restored to entry is a legal right given by the statute and cannot be controlled by executive discretion.

“It follows that after the land has become subject to entry, Eby was entitled to the usual notice provided by the statute of the preference right to make entry of the land within the statutory period.”

Also, in the case of *Wright v. Francis et al.*, 36 Land Dec. 499, decided June 6, 1908, a case wherein Wright, on July 30, 1903, instituted a contest against the entry of one Armstrong, the Land Department withdrawing the land from entry on June 13, 1904, the contest being decided in favor of Wright on April 24, 1905, while the land was still withdrawn from entry, the Secretary of the Interior, in reviewing the decision of the Commissioner, who had held that Wright's preference right did not expire within the thirty days after notice of the cancellation of the Armstrong entry, said, in part, as follows:

“You hold that Wright in view of the withdrawal and restoration to entry of the land in controversy, made valid use of his preference right and sustain his application. * * *

“In view of the reasons underlying section 7 of the Circular of June 6, 1905 (33 L. D. 607), and the fact that no valid application to make homestead entry for this tract was then pending, it is held that the time within which Wright could use his preference right did not expire until thirty days after June 20, 1905, the date upon which said land was subject to entry, and that his application was submitted in time for consideration. This is clearly in accord with departmental action in the unreported case of Edwin P. Marshall, assignee, of date September 12, 1907,

and under the circumstances shown by the record, the unreported case of Hufford v. Waugh, of June 26, 1906, will not be followed.

“It is noticed that Wright’s application was filed before the date fixed upon which this land was to become subject to entry, but the time allowed him to use his preference right as then understood was about to expire, no ruling having been made allowing such right to be exercised thirty days after the date of restoration of the lands to entry. Under the circumstances his application will be considered as made in due and proper time.”

To the same effect is the case of Beach v. Hansen, 40 Land Dec. 607, rendered April 3, 1912, and also the case of Wells v. Bodkin, 42 Land Dec. 340, rendered August 29, 1913, and also the case of Edwards v. Bodkin, 42 Land Dec. 172, decided May 27, 1913.

To the same effect is the case of Joseph F. Gladeux, 41 L. D. 286, where the department holds as follows (quoting from the syllabus):

“A successful contestant of an entry within a reclamation withdrawal is not barred of his preference right by section 5 of the Act of June 25, 1910, but said act has the effect to postpone the exercise of such right until the project is so far completed that water can be applied to the land and the Secretary of the Interior has made public announcement of that fact.”

Attention is also directed to circular in reference to “Laws and Regulations Relating to the Reclamation of Arid Lands by the United States,” approved by the

Secretary of the Interior Feb. 6, 1913, and particularly to the regulations as contained in said circular, to be found in 42 Land Decisions, commencing at p. 365. These regulations, as shown by section 1, are promulgated under authority of the Reclamation Act of June 17, 1902, and section 26 of those regulations, found on page 370 of 42 Land Decisions, provides, among other things, as follows:

“When any entry for lands embraced within a first or second form reclamation withdrawal is cancelled for any reason such lands become subject immediately to such withdrawal. Such lands under first form withdrawal cannot therefore, so long as they remain so withdrawn, be entered or otherwise appropriated either by a successful contestant or any other person; but any contestant who gains a preference right to enter any such first form withdrawal lands may exercise that right at any time within 30 days from notice that the lands involved have been restored to public domain or the withdrawal changed to second form. * * *

PROPOSITION No. 5.

However, regardless of the propositions heretofore advanced, we find direct authority in the Act of Congress of June 17, 1902, known as the “Reclamation Act,” in support of the rules and regulations promulgated by the Secretary of the Interior, which rules and regulations as we shall hereafter show, expressly provided that if a contest were won during the time when lands were withdrawn under the Reclamation Act, the successful contestant would have thirty days

from the date the lands were thrown open to entry within which to exercise his preference right.

It will be remembered that the Act of Congress granting to the successful contestant the preference right of thirty days from the date of notice to him that the entry he contested had been cancelled was passed May 14, 1880. It will also be remembered that lands described in the indictment in this case were withdrawn by order of the Secretary of the Interior under and by virtue of the Act of June 17, 1902, known as the Reclamation Act. [Tr. p. 82.]

Section 3 of the Reclamation Act of June 17, 1902 (32 Stats. 388) provides, in part, as follows:

“That the Secretary of the Interior shall, before giving the public notice provided for in section four of this act, withdraw from public entry the lands required for any irrigation works contemplated under the provisions of this act, *and shall restore to public entry any of the lands so withdrawn when, in his judgment, such lands are not required for the purposes of this act*; and the Secretary of the Interior is hereby authorized, at or immediately prior to the time of beginning the surveys for any contemplated irrigation works, to withdraw from entry, except under the homestead laws, any public lands believed to be susceptible of irrigation from said works: *Provided*, that all lands entered and entries made under the homestead laws within areas so withdrawn during such withdrawal shall be subject to all the provisions, limitations, charges, terms, and conditions of this act; * * * the Secretary of the Interior shall determine whether or not said project is practica-

ble and advisable, and if determined to be impracticable and unadvisable, he shall thereupon restore said lands to entry."

And section 10 of the same act provides as follows:

"That the Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this act into full force and effect."

The order of the Secretary of the Interior withdrawing under the Reclamation Act the lands described in the indictment was issued September 12, 1903 [Tr. p. 82], and thereafter, on June 6, 1905, the Secretary of the Interior, in pursuance of the power given him by section 10 of the Reclamation Act heretofore set out, promulgated the following rules or regulations in reference to the lands theretofore withdrawn by him under the Reclamation Act:

"Sixth. Any entry embracing lands included within any withdrawal, made under either of the forms mentioned, whether such entry was made before or after the date of such withdrawal, may be contested and cancelled because of entryman's failure to comply with the law or for any other sufficient reason, *and any contestant who secures the cancellation of such entry and pays the land office fees, occasioned by his contest, will be awarded a preferred right of making entry under the Reclamation Act, provided the lands involved are not embraced within a withdrawal of the first form.*

“Seventh. When any entry for lands embraced within a withdrawal *under the first form* is cancelled by reason of contest or for any other reason, such lands become subject immediately to such withdrawal and cannot, thereafter, so long as they remain so withdrawn, be entered or otherwise appropriated, either by a successful contestant or any other person; *but any contestant who gains a preferred right to enter any such lands may exercise that right at any time within thirty days from notice that the lands involved have been released from such withdrawal and made subject to entry.*”

Transcript, page 83, shows that the witness J. M. Ocheltree, received his preference right to make entry on the lands described in count one of the indictment, on the 30th day of September, 1908, and those lands on that date were therefore subject to the rules and regulations of the Secretary of the Interior of June 6, 1905, as hereinabove set out, the next rules and regulations by the Secretary of the Interior not having been promulgated until January 19, 1909 (37 L. D. 365).

Counsel for plaintiffs in error has, in some inexplicable manner, entirely misconstrued the rules and regulations of June 6, 1905, in that they contend throughout their brief that section 6 of said rules and regulations expressly deny a preference right to a successful contestant of an entry on lands included within a first form withdrawal, and they fail entirely to note that section 7 of the same rules and regulations does expressly provide for a preference right to a successful

contestant of an entry on lands included within the first form withdrawal.

It will be remembered that lands withdrawn under a first form withdrawal cannot be entered, selected or located in any manner so long as they remain so withdrawn, and that those lands embrace the lands that may possibly be needed in the construction and maintenance of irrigation works, but that lands withdrawn under the second form can be entered under the homestead laws, subject to the provisions of the Reclamation Act, and that those lands embrace lands which are not supposed to be needed in the actual construction and maintenance of irrigation works, but which may possibly be irrigated from such works. (See Circular June 6, 1905, 33 L. D. 607.)

It will be noted, therefore, from the above understanding of the difference between lands withdrawn under a first form withdrawal and lands withdrawn under the second form, that section 6 of the Circular of June 6, 1905, provides, in substance, that an entry embracing lands included within *any* withdrawal made under either of the forms mentioned, and whether such entry was made before or after the date of such withdrawal, may be contested and cancelled, and that any contestant who secures the cancellation of such entry will be awarded a preference right of making entry under the Reclamation Act, provided the lands involved are not embraced within a withdrawal of the first form. Meaning simply, that a contest could be instituted against an entry embracing lands included within either a first or second form withdrawal, but

that if the contestant were successful and the lands were withdrawn under the second form, he would be allowed a thirty days preference right, but if the lands were withdrawn under a first form withdrawal in view of the fact that the successful contestant could not exercise his preference right, as he could not make entry, section 7 of the Circular of June 6, 1905, by its express terms, took care of the rights of the successful contestant who thus secured a preference right to make entry on lands withdrawn under a first form withdrawal. Section 7 starts out from the very beginning by saying:

“When an entry for lands embraced within a withdrawal under the first form is canceled by reason of contest or for any other reason, such lands become subject immediately to such withdrawal and cannot, thereafter, so long as they remain so withdrawn, be entered or otherwise appropriated, either by a successful contestant or any other person; *but any contestant who gains a preferred right to enter any such lands may exercise that right at any time within thirty days from notice that the lands involved have been released from such withdrawal and made subject to entry.*”

The reading of these two sections is so very plain that it is hard to understand how counsel for plaintiffs in error have misread them. A greater part of their brief is based upon their erroneous reading of these two sections whereby they construe those sections to expressly deny the preference right to a successful contestant of an entry on lands included within the

first form withdrawal, whereas, as above shown, section 7 of that circular, quoted by counsel for plaintiffs in error themselves on page 24 of their brief expressly states that it is dealing with granting a preference right to a successful contestant of an entry on lands included within the first form withdrawal. It would seem that this mistake of counsel for plaintiffs in error is responsible for this appeal, as those sections themselves considered with the authority under which they were promulgated absolutely answer every contention that counsel for plaintiffs in error has made in their brief.

As above stated, the witness J. M. Ocheltree received notice of the successful termination of his contest against the entry of one Danford Arnold on the 30th day of September, 1908, while the lands described in the indictment were withdrawn under the Reclamation Act [Tr. p. 83] and by virtue of section 7 of the Circular of June 6, 1905, he had gained under the Constitution and laws of the United States the preference right to enter those lands in exercise of his preference right at any time within thirty days from notice that the lands involved had been released from such withdrawal and made subject to entry. The lands described in count one of the indictment were, on the 10th day of January, 1910, by an order of the Secretary of the Interior, among other lands, restored to public settlement on April 18, 1910, and public entry on May 18, 1910. [Tr. p. 84.] Transcript, page 85, further shows that on May 18, 1910, J. M. Ocheltree filed his application for a homestead upon the said

lands described in count one of the indictment upon the basis and by virtue of the preference right theretofore granted him by the Land Department of the United States, thus exercising his preference right within thirty days from April 18, 1910, the date on which the lands were retsored to public settlement.

Thereafter, the entry of J. M. Ocheltree thus made on May 18, 1910, was on June 3, 1912, allowed by the Land Department. This undoubtedly gave him the right under the Constitution and laws of the United States, to make entry and settlement on that particular land and otherwise comply with the United States land laws, and as Judge Wellborn of the trial court so instructed the jury [Tr. pp. 50 and 92] we submit that there was no error in that instruction.

Your attention is also invited to the fact that since the preference right of J. M. Ocheltree was granted on the 30th day of September, 1908, and that since it was granted under section 7 of the rules and regulations of the Department of the Interior of June 6, 1905, the claim of counsel for plaintiffs in error that by the Departmental Rules and Regulations of January 19, 1909, the preference right of Ocheltree theretofore granted was cancelled *ipso facto*, would be depriving the witness Ocheltree of his rights as guaranteed under the Constitution, by means of an *ex post facto* law, and it was undoubtedly in consideration of these rights gained under the Rules and Regulations of June 6, 1905, and bearing in mind that the Rules and Regulations of January 19, 1909, would not apply to the case of Ocheltree, that the Land Department al-

lowed his entry under his preferenc right granted September 30, 1908, and which finding the Secretary of the Interior later affirmed by affirming the decision of June 3rd, 1912, of the Commissioner allowing the homestead application of said Ocheltree.

Judge Sanborn, speaking for the Circuit Court of Appeal, Eighth Circuit, in the case of *James et al. v. Germania Iron Co.*, 107 Fed. 602, said:

“The rights of these parties vested on February 23, 1889. They were initiated under and conditioned by the laws of the land and the rules and practice of the department on that day and no subsequent rules, decisions or practice could divest them of the property they then secured or deprive them of their equitable or legal rights to the title to the land which they then acquired. *Cornelius v. Kessel*, 128 U. S. 456; *Shreve v. Cheesman*, 69 Fed. 785. For this reason the subsequent practice and decisions of the department, which have been carefully considered, will not be reviewed at length in this opinion, but will be here laid aside with the remark that they are without legal effect upon the issues in this case and their examination has proved futile and profitless.”

This is a proposition too well established in our jurisprudence to need support by citing further authorities.

However, it is not conceded that the rules and regulations of the Secretary of the Interior of January 19, 1909, prevented the acquiring of the preference right by a successful contestant upon his paying the Land

Office fees and procuring the cancellation of an entry, even though the land involved were within a first form withdrawal, and in support of the view that said rules and regulations do not prohibit the acquiring of such preference right, we respectfully call attention to the decision of the Land Department in the case of *Edwards v. Bodkin*, 42 L. D. 172, which says, in part, as follows:

“The preference right of entry conferred by the act of May 14, 1880, *supra*, upon any person who ‘has contested, paid the land office fees, and procured the cancellation’ of a homestead entry is a *statutory right which the land department is without authority to deny or disregard by regulations or otherwise* See *Beach v. Hansen* (40 L. D. 607).

“The regulations of January 19, 1909, *supra*, were intended to apply to lands under *proper withdrawals for public use* and for the protection of public interests. *But where, as in this case, it is found that a withdrawal was made under a misapprehension of fact, said regulations could have no further effect than to postpone the exercise of the preference right until the lands were restored to public entry.*

“The department has given careful consideration to the claims on behalf of Edwards, that he has made *bona fide* settlement on the land and has largely reclaimed the same from its desert state. As has been stated, this department is without authority, as well as without disposition, to disregard the preference right of entry, duly earned by Bodkin under the law.”

Thus, it will be seen that the Secretary of the Interior recognized the preference right gained by a person contesting an entry as a *statutory right* under the Act of May 14, 1880, which could not be changed by any rules or regulations of the department, and that if such rules and regulations did interfere with the rights of a successful contestant and prohibit him from gaining the preference right provided for in said Act of May 14, 1880, said rules and regulations would be void in so far as they interfere with such statutory right of a successful contestant.

For the foregoing reasons, we respectfully submit that there is no merit in the appeal in this case, and there being no other errors properly assigned, and, as we believe the record failing to disclose any, the judgment of the trial court should be affirmed.

ALBERT SCHOONOVER,

United States Attorney.

ROBERT O'CONNOR,

Assistant U. S. Attorney.

CLYDE R. MOODY,

Assistant U. S. Attorney.

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No. 2569

United States
Circuit Court of Appeals
For the Ninth Circuit.

HOWARD D. THOMAS COMPANY, a Corporation,
Petitioner,
vs.

WM. H. BEHARRELL, WM. C. ALVORD and ELLIOTT CORBETT,
as Trustees in Bankruptcy of the Estate of I. GEVURTZ &
SONS, Bankrupt,
Respondents.

In the Matter of I. GEVURTZ & SONS, Bankrupt.

Petition for Revision

Under Section 24b of the Bankruptcy Act of Congress,
Approved July 1, 1898, to Revise, in Matter of
Law, a Certain Order of the United
States District Court for the
District of Oregon.

Filed

APR 6 - 1915

F. D. Menckton,
Clerk

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Circuit Court of Appeals
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RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the United States Circuit Court of Appeals for
the Ninth Circuit*

In the Matter of I. GEVURTZ & SONS,
Bankrupt.

**Petition for Revision of the Order Refusing Howard
D. Thomas Company Permission to Liquidate
Claim.**

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The petition of Howard D. Thomas Company, a corporation, organized and existing under the laws of the State of Washington, respectfully shows unto the Court:

I.

That on the — day of May, 1913, I. Gevurtz & Sons, a corporation, was duly adjudged a bankrupt, by the District Court of the United States for the District of Oregon; that thereafter Wm. H. Beharrell, Wm. C. Alvord and Elliott Corbett, were duly elected and qualified, and have ever since been and now are acting as trustees in said bankruptcy proceedings.

II.

That thereafter on September —, 1913, petitioner filed its proof of claim in bankruptcy as a general creditor in the usual and approved form, and later on November 22, 1913, filed its petition for leave to withdraw said proof of claim, which said last mentioned petition was duly allowed.

III.

That promptly upon the entry of the order allow-

ing said withdrawal, petitioner filed its Petition in the District Court of the United States for the District of Oregon asking leave to liquidate its claim against the bankrupt, which Petition, omitting heading and formal parts, is as follows:

(Petition for Leave to Liquidate Claim.)

“Your petitioner, Howard D. Thomas Company, respectfully represents:

1.

That it is and at all times hereinafter mentioned has been a corporation duly organized and existing under and by virtue of the laws of the State of Washington.

2.

That your petitioner has had business dealings with the bankrupt for some time prior to 1913, but that petitioner had sold bankrupt only significant amount of goods during the months of January, February, and March, 1913, because of the fact that petitioner knew of the slowness of bankrupt in meeting its obligations and was reluctant to extend any substantial credit to the bankrupt.

3.

That in the month of April, 1913, one Philip Gevurtz, then President of the bankrupt, applied to petitioner for a large amount of immediate credit, to wit, the immediate shipment of rugs of the value of between three and four thousand dollars. That at the time of receiving said application, petitioner had learned that the bankrupt was tendering a proposition to its creditors, looking toward the procuring of an extension for a period of months and years for

the payment of its large accounts and bills payable, and was for this reason and because of the reluctance hereinbefore referred to unwilling to extend credit to the bankrupt, but that petitioner was at said time assured and told by the said Philip Gevurtz that said extension on the part of the large creditors had been practically secured and that a Portland bank had agreed to advance the sum of \$100,000 to the bankrupt and that it had been arranged between the bank and the bankrupt that one Hexter should become connected with the bankrupt concern and that this money would suffice to pay all small outstanding bills of the bankrupt at once and enable the bankrupt, in view of the extension hereinbefore referred to, promptly to meet current obligations; that the said Philip Gevurtz further stated to petitioner at said time that the bankrupt had already procured from the bank a part of the agreed amount and that arrangements had been made for the payment of the balance during the following week.

4.

That your petitioner believed and relied upon the said statements of facts upon the part of said Philip Gevurtz, and that the same constituted material inducements for the shipment of the goods referred to and that said goods would not have been shipped by petitioner but for the supposed truth of the facts stated by the said Philip Gevurtz; that as a matter of fact neither at said time or subsequently had any such arrangements been perfected by or on behalf of said bankrupt, as stated by the said Philip

Gevurtz. That all of said representations were wholly false.

5.

That your petitioner believing and relying upon the truth of said representations as aforesaid, shipped to bankrupt during the month of April, 1913, rugs of the agreed and reasonable value of Three Thousand Nine Hundred and Seven and $36/100$ (\$3,907.36) Dollars, and that within a period of three weeks from the average date of shipments by the petitioner to the bankrupt, said bankrupt was adjudicated as such in the above-entitled Court and cause; that a few days prior to said adjudication, the bankrupt returned to the petitioner portions of said shipments amounting to the sum of Two Thousand Nine Hundred and Eleven and $60/100$ (\$2,911.60) Dollars, and that rugs to the amount of Nine Hundred and Ninety-six and $26/100$ (\$996.26) Dollars were retained by or sold by the bankrupt or by the trustees in bankruptcy.

6.

That your petitioner thereafter and without knowledge at said time of the falsity of the representations hereinbefore referred to filed its proof of claim for said Nine Hundred and Ninety-six and $26/100$ (\$996.26) Dollars, and upon objection being made to said proof of claim by the trustees in bankruptcy, on the alleged ground that petitioner had received a preference in the shape of said returned goods, the President of your petitioner, Howard D. Thomas, attended the taking of testimony at the office of Chester G. Murphy, Esq., Referee in Bank-

ruptcy, to whom the cause had been referred, and upon said date of the taking of said testimony, learned for the first time, through inquiries, of the total falsity of said material representations.

7.

That your petitioner was thereupon advised that the proper procedure was by means of a petition of the nature of this pleading, and for the purpose of filing same requested permission to withdraw the said proof of claim, which said permission was accordingly granted by said referee.

8.

That your petitioner is advised and therefore avers that under the facts stated, it became, was and is entitled to rescind the sale, thus fraudulently procured and reclaim its rugs, with damages for such as cannot be returned, but that it is necessary to procure the consent of this Honorable Court and the direction of the Court as to the method of liquidating its said demand against the bankrupt, as a condition precedent to the filing of its claim.

WHEREFORE, your petitioner prays that it may be permitted to liquidate its said claim against the bankrupt for the sum of Nine Hundred and Ninety-six and 26/100 (\$996.26) Dollars, growing out of the damage resulting to petitioner through said false representations and through its shipment on the strength thereof, in whatever manner, time and place this Honorable Court may direct, and that upon the liquidation of its said claim, if said claim be found to be proper, that the amount adjudged to petitioner as the result of said liquidation may be made the

basis of proof of claim against the bankrupt by the petitioner as a general creditor, to the extent of such liquidated amount, and that petitioner as such general creditor, may participate in the dividends in bankruptcy herein."

IV.

That a motion to dismiss said petition was filed by the trustees in bankruptcy herein on the alleged ground that it did not state facts sufficient to show a right of liquidation; and said matter was thereafter, on March 2d, 1914, referred by said Court to A. M. Cannon, Esq., as Special Master, said Order (omitting heading and formal parts) being as follows:

(Order Referring Petition to Master.)

"This matter came on to be heard upon the motion of Chris. A. Bell, of counsel for trustees, for an order to dismiss the petition to liquidate claim of Howard D. Thomas Company, whereupon it is ordered that said motion, together with the petition of the Howard D. Thomas Company, to liquidate claim, be referred to A. M. Cannon, Esq., as Special Master to take such testimony as may be necessary in said matter and to report the same back to this Court together with his findings thereon, both of law and of fact, with all convenient speed."

V.

That thereafter, the said A. M. Cannon, Esq., as Special Master, filed a report showing his Findings of Fact and Conclusions of Law, which said Report, omitting heading and formal parts is as follows:

(Report of Special Master.)**“STATEMENT OF FACTS.**

In April, 1913, the bankrupt applied to the petitioner for the purchase of a lot of rugs, invoice of which was upwards of \$3,000. At the time this order was given and the sale made the bankrupt was in difficulties with its creditors, was heavily involved and far in arrears with current merchandise bills. Negotiations had theretofore been had, and were at the time pending, with the First National Bank for securing funds sufficient in amount to take up and discharge all outstanding small merchandise bills, thus enabling the bankrupt to continue its business without being hampered. Probably at the suggestion of the bank, an expert accountant was then in the bankrupt's store engaged in making a technical estimate of its assets and liabilities, and a committee of three financiers, whether working under the direction of the bank does not appear, was acting in an advisory capacity with the bankrupt's officers. Two of this committee were prominent officers in the First National Bank and heavily interested in that institution. These negotiations had progressed far enough, as, I believe, to induce the officers of the bankrupt genuinely to believe that the bank intended to, and would, in a very short time, supply it with \$100,000.00, or so much thereof as was necessary to discharge its current merchandise obligations. Indeed, I believe some money had already been advanced for this purpose.

In this situation, Philip Gevurtz, President of the

Bankrupt, called Howard D. Thomas, President of the petitioner, over the phone at Seattle and placed the order for the rugs in question. In this conversation Thomas at first declined to honor his order, telling Gevurtz that his firm was slow in paying bills, that they had failed to pay bills long past due, and that he would not ship the goods unless absolutely certain that Thomas & Company would receive its money. To this Gevurtz replied, in substance, that they were absolutely certain of paying the bill because they had made arrangements with the First National Bank to advance them \$100,000 for the purpose of paying their pressing obligations, which would supply them with sufficient capital to run the institution along. He understood to absolutely guarantee that Thomas & Company would be paid, and with this assurance Thomas agreed to ship the goods.

I think there is no doubt that upon this occasion Philip Gevurtz was acting in entire good faith and believed, with good reason, that negotiations with the bank were practically certain to result as contemplated and that at this date the Gevurtz corporation fully expected the bank to step in and advance sufficient funds to put them upon their feet. I find no evidence of fraud or bad faith in his conduct.

Within about thirty days from the date of the shipment negotiations with the bank, for some reason, fell through and bankruptcy was precipitated. Within four or five days before the petition was filed, Philip Gevurtz called Thomas & Company up on the phone and explained to them that they were in trouble and wished to return the rugs. Mr.

Thomas who is the manager and sole owner of the company, was absent in the East at the time and those in charge in his absence told Gevurtz they had no authority to receive the rugs back and that if they were shipped it must be upon the responsibility of Gevurtz & Company. However, their traveling salesman came down to confer with the bankrupt and, while here, this party was informed by Philip Gevurtz of the reason for wishing to return the rugs, which was that they were in serious financial straits, threatened with bankruptcy, and he felt in honor bound, in view of his statements to Thomas, to protect them. This party declined to receive the rugs upon the ground that he had no authority to do so, but anyway, the rugs undisposed of were at once crated and shipped back to Thomas & Company and credit was given by them to the bankrupt for the invoice thereof upon the account.

The petition in bankruptcy was filed early in May, 1913, and in September, 1913, Thomas & Company filed a claim against the estate for \$996.26, the balance due upon the purchase price of the rugs after crediting the amount returned. Thereafter objection to the claim was made by the trustees upon the ground that Thomas & Company had received a voidable preference through the return of the rugs, which preference must be returned to the trustees before allowance of a claim for the balance. On this objection being made Thomas & Company asked leave, before the Referee, to withdraw their claim, and, in support thereof, urged they were not advised of the alleged fraudulent representation made by Philip

Gevurtz at the time of the sale. They were allowed to withdraw their claim. Subsequently they filed this petition to be allowed to liquidate their claim.

CONCLUSIONS OF LAW.

Upon the foregoing facts, I am of the opinion that this petition should be denied, for two reasons:

The first is that proof of fraud upon the part of the bankrupt's officers is insufficient. In order to be allowed to liquidate its claim, the result of the transaction must be such as to create the right in the Thomas Company to rescind this sale for fraud and reclaim the goods. Such a proceeding is not favored, and, to support it, the proof must be clear, either that the bankrupt falsely represented solvency when in fact it was insolvent, or, being solvent, falsely represented the extent of its assets, in each case for the purpose of obtaining credit. In this case there does not appear to have been any representation as to solvency. The representation, such as was made, was rather as to the bankrupt's ability to pay. This might be construed to involve a representation as to the extent of the assets, but, if so, I think there is no question but that Philip Gevurtz stated conditions frankly and believed, and had reasonable expectations, that the bankrupt would be able to pay for these goods. Under such conditions, as I understand it, the right to rescind does not exist.

In re Burk, 25 Am. B. R. 170;

In re Roalswick, 110 Fed. 639;

In re Davis, 112 Fed. 294.

Again, Thomas & Company, at the time they filed their claim for the balance due on the purchase price

of the rugs, placed themselves in the position of a creditor and thus lost the right to rescind, if it ever existed. If they did not then know of the alleged falsity of the representations made by Philip Gevurtz as to the acquisition of \$100,000, they were, and for a long time had been, in possession of such facts as to put them upon inquiry concerning the same, which in law amounts to the same thing. They were aware that within a very short time after the representation was made the concern became bankrupt, and that this would not have happened had the boasted relief been forthcoming. They knew that Philip Gevurtz insisted, by telephone and otherwise, that they allow him to make good his word guaranteeing payment by taking back the rugs; that, in order to do so, he actually did ship them, that they had long since received them and that they had given bankrupt credit on account of them. Knowing all these circumstances, and being bound to take them into consideration, it does not seem to me that they were unadvised of the alleged falsity of Gevurtz's representations at the time they filed their claim before the referee, and that in so doing, they elected between their remedies and elected to become a creditor. Having done so, they cannot now change their position and attempt to rescind the sale upon the ground of fraud.

In re Droege v. Ahiens etc. Mfg. Co., 163 N. Y. 466;

In re Hildebrandt, 129 Fed. 992.

It is therefore recommended that the petition of Howard D. Thomas & Company to liquidate their claim be denied.

I hand up with this Report for the consideration of the Court, the following documents considered upon this hearing:

1. Petition of Howard D. Thomas & Company to liquidate their claim.
2. Motion of trustees to dismiss petition.
3. Two parcels of testimony in connection with the hearing on the Thomas claim."

VI.

That thereafter petitioner filed its Exceptions to said report as follows (omitting heading and formal parts):

(Exceptions to Master's Report.)

"Petitioner, Howard D. Thomas & Company, a corporation, files herewith its exceptions to the report of the Special Master on its application for leave to liquidate its claim herein.

Exceptions to Findings of Fact.

Petitioner excepts to the failure of said report to find as a fact that at the time the rugs were ordered of petitioner by the above-named bankrupt, negotiations for settlement with its creditors were pending and bankrupt's affairs were under the supervision of a creditor's committee; that the rugs were necessary for the bankrupt's continuance as a going concern and were ordered with the said committee's consent under a distinct provision that they be paid for or returned to petitioner.

Petitioner also excepts to the failure of said report to find as a fact that at the time petitioner filed its claim, and up until the hearing of objections thereto

it had no knowledge or reason to believe that the statement of bankrupt that it had effected arrangements with the First National Bank of Portland, Oregon, was false; that petitioner made no conscious election with full knowledge of the facts until shortly before it filed its petition to withdraw its claim as a general creditor; that neither any delay of petitioner nor any other action of petitioner, resulted in an injury to any third party or altered the position of any one affected thereby.

Exceptions to Conclusions of Law.

Petitioner excepts to the statement by the Special Master of the law with regard to right of rescission for fraud and contends that the report should have found that where a contract is induced by a statement of material fact, made as of his own knowledge by one in a position to know its truth or falsity, and the statement is believed and relied on by the other party to his damage, and is not true, that the transaction is fraudulent as a matter of law and the innocent party may rescind; petitioner contends that this general statement is applicable to the facts found by the Master and to the additional facts hereinbefore set forth, and renders it proper to permit petitioner herein to liquidate its claim.

Petitioner excepts to the conclusion with reference to an alleged election of remedies and contends that the equitable doctrine is that an election is binding only where made with full knowledge of all the facts, or where on the basis of estoppel it would be inequitable to permit a change of position because of the

interests of third parties; and that the conclusion here should have been that petitioner made no conscious election with full knowledge and it would be inequitable and harsh and productive of injustice to hold that petitioner is barred by a technical election."

VII.

That on January 11, 1915, the said District Court entered the following Order overruling said Exceptions and confirming said Report (omitting heading and formal parts) as follows:

(Order Confirming Master's Report.)

"This cause was heard upon the exceptions filed by Howard D. Thomas Company to the findings of the Special Master upon the petition of said Howard D. Thomas Company to liquidate their claim against the estate of the above-named bankrupt; and was argued by Mr. Roscoe C. Nelson, of counsel for said creditor, and by Mr. C. A. Bell, of counsel for the trustees of the estate of the said bankrupt, in consideration whereof it is ORDERED AND ADJUDGED that the findings of the said Special Master be and the same are hereby affirmed, and that the petition of said Howard D. Thomas Company to liquidate their said claim be and the same is hereby denied."

No opinion was rendered by the Court in said matter, save a formal announcement that the order would be entered.

VIII.

That said order was erroneous in matter of law, in that the conclusions of law by the Special Master from the Findings of Fact, and the confirmation

thereof by the District Court were incorrect in the following respects:

1. That the Master and the Court having found as a matter of fact that the shipment of goods by Howard D. Thomas Company had been induced by a misstatement of material fact, made as of his own knowledge by the President of the bankrupt concern, who was in a position to know its truth or falsity, and that the statement was believed by and relied on by Howard D. Thomas Company to its damage, should have concluded as a matter of law that Howard D. Thomas Company had the right to rescind.

2. That the Master and the Court should have concluded as a matter of law from the facts found that, inasmuch as the so-called election was not made with full knowledge of the facts, and no change of position had occurred and no interests of third parties had intervened, no principle of estoppel should be invoked and no technical doctrine of election should be held to bar petitioner in this proceeding; that the conclusion that the principle of election should be invoked not only where the party has actual knowledge, but where he can be charged with knowledge which diligence would have enabled him to obtain, is erroneous and inequitable.

That all of the reasons and points above set forth were raised in the Exceptions to the Master's Report and insisted upon and argued before the said District Court of the United States.

WHEREFORE, your petitioner prays that the order of the District Court of the United States for the District of Oregon overruling the Exceptions of

Petitioner to the Report of the said Special Master, which order was entered on the 11th day of January, 1914, may be revised and reviewed in matter of law by your Honorable Court, as provided by Section 24b of the Bankruptcy Act of 1898, and the rules and practice thereunder in such cases made and provided, and that said Order be set aside and held for naught, with such directions to the District Court of the United States for the District of Oregon as to this Court may seem proper.

Dated this 4th day of February, 1915.

HOWARD D. THOMAS COMPANY,

Petitioner.

By ROSCOE C. NELSON,

Its Attorney.

BEACH, SIMON & NELSON,

Solicitors for Petitioner.

United States of America,
District and State of Oregon,
County of Multnomah,—ss.

I, Roscoe C. Nelson, being first duly sworn, say: That I am one of the attorneys for the petitioner herein, and have knowledge of the facts stated in the foregoing petition and same are true as I verily believe.

ROSCOE C. NELSON.

Subscribed and sworn to before me this 4th day of February, 1915.

[Seal]

LAURA N. TAPSCOTT,

Notary Public for Oregon.

Admission of Service of Petition for Revision.

State of Oregon,

County of Multnomah,—ss.

Due and timely service of the within Petition for Revision and the receipt of a duly certified copy thereof, all at the City of Portland, in said County and State, is hereby admitted, February 4th, 1915.

C. A. BELL,

Attorneys for Trustees in Bankruptcy of I. Gevurtz & Sons.

[Endorsed]: In the United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of I. Gevurtz & Sons, Bankrupt. Petition for Revision of the Order Refusing Howard D. Thomas Company Permission to Liquidate Claim.

*In the United States Circuit Court of Appeals for
the Ninth Circuit*

In the Matter of I. GEVURTZ & SONS, Bankrupt.

Notice of Filing Petition for Review.

CLAIM OF HOWARD D. THOMAS COMPANY.

To Messrs. Wm. H. Beharrell, Wm. C. Alvord and Elliott Corbett, Trustees in Bankruptcy Herein, and to Messrs. Reed & Bell, Their Attorneys:

You are hereby notified that on the 9th day of February, 1915, we will file in the Clerk's Office of the United States Circuit Court of Appeals for the Ninth Circuit, in the City of San Francisco, California, a Petition for Review in the above-entitled

cause, a copy of which Petition is hereto attached as part of this notice, and we will then ask to have the case docketed and the necessary orders made therein to have same set down for hearing.

Dated this 3d day of February, 1915.

BEACH, SIMON & NELSON,
Solicitors for Petitioner, Howard D. Thomas Com-
pany.

**[Admission of Service of Notice of Filing of Petition
for Revision, etc.]**

State of Oregon,
County of Multnomah,—ss.

Due and timely service of the within Notice of Filing Petition for Revision, etc., and the receipt of a duly certified copy thereof, all at the City of Portland, in said County and State, is hereby admitted, Feb. 4th, 1915.

C. A. BELL,

Attorneys for Trustees in Bankruptcy of I. Gevurtz
& Sons.

[Endorsed]: No. 2569. United States Circuit Court of Appeals for the Ninth Circuit. Howard D. Thomas Company, a Corporation, Petitioner, vs. Wm. H. Beharrell, Wm. C. Alvord and Elliott Corbett, as Trustees in Bankruptcy of the Estate of I. Gevurtz & Sons, Bankrupt, Respondents. In the Matter of I. Gevurtz & Sons, Bankrupt. Petition for Revision Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in

Matter of Law, a Certain Order of the United States
District Court for the District of Oregon.

Filed February 8, 1915.

FRANK D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

HOWARD D. THOMAS COMPANY, a Corporation,
Petitioner,
vs.

WM. H. BEHARRELL, WM. C. ALVORD and ELLIOTT CORBETT,
as Trustees in Bankruptcy of the Estate of I. GEVURTZ &
SONS, Bankrupt,
Respondents.

**MOTION OF TRUSTEES TO DISMISS, AND ANSWER OF
TRUSTEES TO PETITION FOR REVISION**

**Under Section 24b of the Bankruptcy Act of Congress,
Approved July 1, 1898, to Revise, in Matter of
Law, a Certain Order of the United
States District Court for the
District of Oregon.**

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

In the Matter of I. GEVURTZ & SONS, Bankrupt.
**Answer of the Trustees (Hereinafter Referred to as
Respondents) to the Petition of Howard D.
Thomas Company for Revision of Order Refus-
ing Permission to Liquidate Claim.**

To the Honorable Judges of the United States Cir-
cuit Court of Appeals for the Ninth Circuit:

Come now W. C. Alvord, W. H. Beharrell and E.
R. Corbett, the duly appointed, qualified and acting
trustees in the above-entitled matter, and for an-
swer to the petition of the Howard D. Thomas Com-
pany for revision of the order of the District Court
of the United States for the District of Oregon made
and entered on the 11th day of January, 1915, move,
admit and allege as follows, to wit:

Move the Court for an order dismissing said peti-
tion upon the ground that the matters and things
therein set forth constitute a controversy arising in
bankruptcy proceedings, and as such is appealable
under section 24A, or subdivision 3 of section 25 of
the National Bankruptcy Act of 1898.

Further answering your respondents herein

I.

Admit paragraph I of said petition.

II.

Admit paragraph II of said petition, except that
your respondents allege that said petition to with-

draw was filed under the circumstances and conditions as set forth and alleged in the answer of the trustees in re the petition of the Howard D. Thomas Company to liquidate its claim filed with the referee in bankruptcy for the above-named district on the 18th day of March, 1914, which answer is hereinafter set out in full.

III.

Admit paragraph III of said petition to revise.

IV.

Admit paragraph IV of said petition to revise, but allege the fact to be that upon the hearing before the referee on said motion to dismiss, the same was overruled, and thereafter there was filed with the referee the answer of trustees to the petition of said Howard D. Thomas Company set forth in paragraph III of the petition for revision before this court, which answer (omitting heading and formal parts) is in words and figures as follows, to wit:

**[Answer to Petition for Leave to Liquidate Claim
Against Bankrupt.]**

I.

Admit paragraph I of said petition.

II.

Say they have no knowledge or information sufficient to form a belief as to whether the facts set out in paragraph II are true or otherwise, and therefore deny the same.

III.

Deny paragraph III and the whole thereof.

IV.

Deny paragraph IV and the whole thereof.

V.

Deny paragraph V and the whole thereof, except that it is specifically admitted that the reasonable value of the rugs as shipped was three thousand nine hundred seven and 36/100 dollars (\$3,907.36).

VI.

Deny paragraph VI and the whole thereof, except that it is specifically admitted that the petitioner herein filed its proof of claim for nine hundred ninety six and 26/100 dollars (\$996.26) in the above-entitled estate, and that the same was objected to by the trustees in bankruptcy upon the grounds that the petitioner had received a preference, and specifically admit that the said Howard D. Thomas attended the taking of testimony on said objections to said claim at the office of Chester G. Murphy, Esq., Referee in Bankruptcy, to whom the cause had been referred.

VII.

With reference to paragraph VII the trustees say that they have no knowledge or information sufficient to form a belief as to whether the facts set out in said paragraph are true or otherwise, and therefore deny the same.

VIII.

Deny paragraph VIII and the whole thereof.

And for a further and separate answer to the petition to liquidate claim heretofore filed herein, the trustees heretofore named respectfully represent:

I.

That they are the duly appointed, qualified and acting trustees herein.

II.

That the petitioner was at all times herein mentioned and still is a corporation organized and existing under and by virtue of the laws of the State of Washington.

III.

That in the month of April, 1913, the petitioner sold and delivered to I. Gevurtz & Sons, the above-named bankrupt, rugs of the value of three thousand nine hundred seven and 36/100 dollars (\$3,907.36).

IV.

That at the time of said sale petitioner was notified by the said bankrupt that it was negotiating for sufficient advance from the bank to take care of all small outstanding bills and preferred claims, and that I. Gevurtz & Sons would be in a position to pay for the rugs in the usual course.

V.

That said rugs were thereupon sold and delivered to I. Gevurtz & Sons.

VI.

That I. Gevurtz & Sons was duly adjudged bankrupt on the 9th day of May, 1913; that a few days prior to said adjudication, said Philip Gevurtz, president of I. Gevurtz & Sons, notified petitioner that I. Gevurtz & Sons was to be declared bankrupt or go into voluntary bankruptcy, as the case might be, and that I. Gevurtz & Sons desired to return the rugs heretofore sold and delivered to it by petitioner.

VII.

That an agent of the said Howard D. Thomas Co.

came to the City of Portland at the request of I. Gevurtz & Sons for the purpose of negotiating for the return of said rugs, and that the said Howard D. Thomas Company was notified of the financial condition and situation surrounding I. Gevurtz & Sons, and that said I. Gevurtz & Sons offered to return said rugs, but the said Howard D. Thomas Company then and there elected to stand upon its contract and refused to accept said offer of return, and stated that any return of said rugs must be upon the responsibility of I. Gevurtz & Sons.

VIII.

That thereafter the said I. Gevurtz & Sons on their own responsibility shipped said rugs to the said Howard D. Thomas Company at Seattle, Washington, and the same were accepted by the said Howard D. Thomas Company, and credit was given upon the purchase price.

IX.

That thereafter, and on the — day of 1913, the said Howard D. Thomas Company with full knowledge of all circumstances surrounding the sale of said rugs, and full knowledge of the failure of I. Gevurtz & Sons, and with full knowledge of its general financial condition, again elected to stand upon said contract of sale, and gave I. Gevurtz & Sons credit on account of said contract in the sum of two thousand nine hundred eleven and 60/100 dollars (\$2,911.60), the alleged value of the rugs returned, and presented its verified claim for the balance due on said contract of sale to the referee herein. That in fact the true value of the rugs returned was three

thousand six hundred twelve and 15/100 dollars (\$3,612.15).

X.

That thereafter, and prior to October 12, 1913, the said Howard D. Thomas attended at Portland, Oregon, the taking of testimony in re said claim for balance due; that at the taking of testimony, Beach, Simon & Nelson, the legal representatives of the said Howard D. Thomas Company (who were at the time of the sale of said rugs and at the time of bankruptcy of said concern the attorneys for I. Gevurtz & Sons, and still are the attorneys for I. Gevurtz & Sons) for and on behalf of the said Howard D. Thomas Company again elected to stand on said contract, and with full knowledge of all the facts surrounding the said sale and surrounding the bankruptcy of I. Gevurtz & Sons, and the reasons therefor, presented testimony on behalf of said Howard D. Thomas Company to substantiate its claim for balance due, which testimony was filed with the referee herein on the 12th day of October, 1913.

XI.

That the referee herein took the matter under consideration and thereafter, and on the 25th day of October, 1913, a brief was filed by the trustees herein in which authorities were cited showing that the filing of said claim and the standing on said contract constituted an election.

XII.

That some time subsequent to the filing of said brief, to wit, on the 22d day of November, 1913, counsel for the Howard D. Thomas Company filed

a motion with the referee in the above-entitled matter asking leave to withdraw said claim, which after argument by counsel was on the 14th day of January, 1914, granted by the referee herein, and that thereafter, and on the 28th day of January, 1914, a petition to liquidate the alleged claim was filed in the United States Court.

WHEREFORE, the trustees pray for an order of this court dismissing said petition to liquidate said claim.

Further answering paragraph IV of said petition for revision your respondents allege the fact to be that the findings of fact and conclusions of law of the special master set forth in the report of the special master shown in paragraph V of the petition for revision were based upon the testimony taken under the issues raised by the petition to liquidate set forth in paragraph III of the petition for revision, and the answer above set out, and that said report of the special master containing his statements of fact and conclusions of law was not based upon the motion to dismiss;

Your respondents further allege the fact to be that by inadvertence the said A. M. Cannon, referee in bankruptcy, acting as special master, failed in his report as such special master to refer back to the District Court said answer, but that in fact the arguments before the District Court upon the exceptions to the report of the special master were based upon the testimony taken on the issues made by reason of said petition to liquidate and the answer above set forth, and your respondents further allege that the

said A. M. Cannon has certified to the District Court the said answer referred to and set out in this paragraph as a part of the record in this matter.

V.

Admit paragraph V of said petition to revise.

VI.

Admit paragraph VI of said petition to revise.

VII.

Admit paragraph VII of said petition to revise.

VIII.

Answering paragraph VIII of said petition for revision your respondents allege the fact to be that said order of the District Court was not erroneous as a matter of law;

Further answering subdivision one (1) of said paragraph VIII your respondents deny that the master and court found as a matter of fact that the shipment of goods by Howard D. Thomas Company had been induced by misstatement of material facts made as of his own knowledge by the president of the bankrupt concern;

Further answering subdivision two (2) of said paragraph VIII your respondents deny that the election of the petitioner as found by the special master and the District Court was not made with full knowledge of the facts, and allege the fact to be that said election was made with full knowledge of the facts, and that the findings of the referee and the District Court so held.

WHEREFORE, your respondents pray

(1) For an order dismissing said petition for revision;

(2) For an order of this Court sustaining the order of the District Court of the United States for the District of Oregon overruling the exceptions of petitioner Howard D. Thomas Company to the report of the special master.

Dated this 11th day of February, 1915.

W. H. BEHARRELL.

E. R. CORBETT.

C. A. BELL,

Solicitor for Petitioners.

United States of America,
District and State of Oregon,
County of Multnomah,—ss.

I, C. A. Bell, being first duly sworn, say: That I am attorney for the respondents herein, and have knowledge of the facts stated in the foregoing answer, and said facts are true as I verily believe.

C. A. BELL.

Subscribed and sworn to before me this 11th day of February, 1915.

[Seal]

ETHEL C. GRAHAM,

Notary Public for Oregon.

**[Admission of Service of Answer to Petition for
Revision.]**

State of Oregon,
County of Multnomah,—ss.

Service of the foregoing Answer by copy as prescribed by law, is hereby admitted, at Portland, Oregon, this 16 day of February, 1915.

BEACH, SIMON & NELSON,

Attorney for —————.

[Endorsed]: Docketed. No. 2569. United States Circuit Court of Appeals for the Ninth Circuit. Howard D. Thomas Company, a Corporation, Petitioner, vs. Wm. H. Beharrell, Wm. C. Alvord and Elliott Corbett, as Trustees in Bankruptcy of the Estate of I. Gevurtz & Sons, Bankrupt, Respondents. Motion of Trustees to Dismiss, and Answer of Trustees to Petition for Revision Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, a Certain Order of the United States District Court for the District of Oregon.

Filed February 18, 1915.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

HOWARD D. THOMAS COMPANY, a Corporation,
Petitioner,

v.

WM. H. BEHARRELL, WM. C. ALVORD, and
ELLIOTT CORBETT, as Trustees in Bankruptcy of the
Estate of I. Gevurtz & Sons, Bankrupt,
Respondents.

In the Matter of I. GEVURTZ & SONS, Bankrupt.

PETITIONER'S BRIEF ON PETITION FOR REVISION.

Under Section 24b of the Bankruptcy Act of Congress,
Approved July 1, 1898, to Revise, in Matter of Law,
a Certain Order of the United States District Court
for the District of Oregon.

MESSRS. BEACH, SIMON & NELSON,
Attorneys for Petitioner.

MESSRS. REED & BELL,
Attorneys for Respondents.

Filed

MAY 17 1915

F. D. Monckton,
Clerk.

NO. 2569

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

HOWARD D. THOMAS COMPANY, a Corporation,
Petitioner,

v.

WM. H. BEHARRELL, WM. C. ALVORD, and
ELLIOTT CORBETT, as Trustees in Bankruptcy of the
Estate of I. Gevurtz & Sons, Bankrupt,
Respondents.

In the Matter of I. GEVURTZ & SONS, Bankrupt.

PETITIONER'S BRIEF ON PETITION FOR REVISION.

Under Section 24b of the Bankruptcy Act of Congress,
Approved July 1, 1898, to Revise, in Matter of Law,
a Certain Order of the United States District Court
for the District of Oregon.

In the United States Circuit Court of Appeals for the
Ninth Circuit.

In the MATTER OF I. GEVURTZ & SONS,
Bankrupt.

Petition for Revision of the Order Refusing Howard
D. Thomas Company Permission to Liquidate
Claim.

STATEMENT OF FACTS

Inasmuch as in this proceeding the Circuit Court of Appeals is asked to review not the Findings of Fact, but the *Conclusions* from those Findings, it will perhaps be most conducive to clarity if we adopt the Statement of Facts as made by the Referee, and ratified by the United States District Court for the District of Oregon, omitting opinions and conclusions of the Referee.

“In April, 1913, the bankrupt applied to the Petitioner for the purchase of a lot of rugs, invoice of which was upwards of \$3,000. At the time this order was given and the sale made the bankrupt was in difficulties with its creditors, was heavily involved and far in arrears with current merchandise bills. Negotiations had therefore been had, and were at the time pending, with the First National Bank for securing funds sufficient in amount to take up and discharge all outstanding small merchandise bills, thus enabling the bankrupt to continue its business without being hampered. Probably at the suggestion of the bank, an expert accountant was then in the bankrupt's store engaged in making a technical estimate of its assets and liabilities, and a committee of three financiers, whether working under the direction of the bank does not appear, was acting in an advisory capacity with the bankrupt's officers. Two of this committee were prominent officers in the First National Bank and heavily interested in that institution. These negotiations had progressed far enough, as, I believe, to induce the officers of the bankrupt genuinely to believe that the bank intended to, and would, in a very short time, supply it with \$100,-

000.00, or so much thereof as was necessary to discharge its *current* merchandise obligations. Indeed, I believe some money had already been advanced for this purpose.

In this situation, Philip Gevurtz, President of the Bankrupt, called Howard D. Thomas, President of the Petitioner, over the 'phone at Seattle and placed the order for the rugs in question. In this conversation Thomas at first declined to honor his order, telling Gevurtz that his firm was slow in paying bills, that they had failed to pay bills long past due, and that he would not ship the goods unless absolutely certain that Thomas & Company would receive its money. To this Gevurtz replied, in substance, that they were absolutely certain of paying the bill because they *had made* arrangements with the First National Bank to advance them \$100,000. for the purpose of paying their pressing obligations, which would supply them with sufficient capital to run the institution along. He undertook to absolutely guarantee that Thomas & Company would be paid, and with this assurance Thomas agreed to ship the goods.

Within about thirty days from the date of the shipment negotiations with the bank, for some reason, *fell through* and bankruptcy was precipitated. Within four or five days before the petition was filed, Philip Gevurtz called Thomas & Company up on the 'phone and explained to them that they were in trouble and wished to return the rugs. Mr. Thomas, who is the manager and sole owner of the company, was absent in the East at the time and those in charge in his absence told Gevurtz they had no authority to re-

ceive the rugs back and that if they were shipped it must be upon the responsibility of Gevurtz & Company. However, their traveling salesman came down to confer with the bankrupt and, while here, this party was informed by Philip Gevurtz of the reason for wishing to return the rugs, which was that they were in serious financial straits, threatened with bankruptcy, and he felt in honor bound, in view of his statements to Thomas, to protect him. This party declined to receive the rugs upon the ground that he had no authority to do so, but anyway, the rugs undisposed of were at once crated and shipped back to Thomas & Company and credit was given by them to the bankrupt for the invoice thereof upon the account.

The petition in bankruptcy was filed early in May, 1913, and in September, 1913, Thomas & Company filed a claim against the estate for \$996.26, the balance due upon the purchase price of the rugs after crediting the amount returned. Thereafter objection to the claim was made by the Trustees upon the ground that Thomas & Company had received a voidable preference through the return of the rugs, which preference must be returned to the trustees before allowance of a claim for the balance. On this objection being made Thomas & Company asked leave, before the Referee, to withdraw their claim, and, in support thereof, urged they were not advised of the alleged fraudulent representation made by Philip Gevurtz at the time of the sale. They were allowed to withdraw their claim. Subsequently they filed this petition to be allowed to liquidate their claim." (Re-

port of Special Master, Petition for Revision, pages 7-10.)

The Master as Conclusions of Law from said Findings decided that there was no fraud or mis-statement of facts sufficient to give petitioner the right to rescind the sale and reclaim the goods, and that even though such right to rescind existed it had been lost, because the petitioner in filing its claim before the Referee for the amount of the shipment had elected between remedies, and could not change its position.

To these Conclusions the Petitioner excepted, but its exceptions were overruled by the District Court, and this Petition for Revision was then filed in this court.

ASSIGNMENTS OF ERROR

1. That the Master and the Court having found as a matter of fact that the shipment of goods by Howard D. Thomas Company, had been induced by a mis-statement of material fact, made as of his own knowledge by the President of the bankrupt concern, who was in a position to know its truth or falsity, and that the statement was believed by and relied on by Howard D. Thomas Company to its damage, should have concluded *as a matter of law* that Howard D. Thomas Company had the right to rescind.

2. That the Master and the Court should have concluded *as a matter of law* from the facts found, that, inasmuch as the so-called election was not made with full knowledge of the facts, and no change of position had occurred and no interests of third parties had intervened, no principle of estoppel was involved and no

technical doctrine of election should be held to bar petitioner in this proceeding; that the conclusion that the principle of election should be invoked not only where the party has actual knowledge, but where he can be charged with knowledge which diligence would have enabled him to obtain, is erroneous and inequitable.

ARGUMENT

The argument in this case falls naturally into two distinct subdivisions, involving respectively the discussion of the two questions presented in the Assignments of Error, viz.:

I. Do the facts found by the Special Master justify a rescission by the Howard D. Thomas Company of the sale of rugs to the bankrupt?

II. Has the right to rescind been lost by a final election on the part of the Howard D. Thomas Company to ratify the sale?

I.

THE RIGHT TO RESCIND

The right of a creditor to reclaim goods in bankruptcy will be found, if analyzed, to be grounded upon the cardinal principle of the law of contracts, that a contract involves a meeting of minds upon the subject-matter. From that elementary principle arises the corollary that where the participation of one party to a contract is induced by the fraud or mis-statement of the other as to a material matter, the contract is voidable by the party defrauded, or misled. This right to rescind and reclaim is not altered or diminished by

ensuing bankruptcy; the courts, State and Federal, are all agreed upon that proposition.

It is important to discern at the outset just what was the Special Master's theory of the extent and limitations of this right to rescind. If his theory is erroneous, it is not surprising that his Conclusions from the facts in the instant case are erroneous. (We speak throughout of the Master's Report because the District Judge merely affirmed the report without opinion or specific reason and presumably adopted the Master's views.)

We call the Court's attention first, to the fact that there are two classes of cases with which the Federal Courts have been called upon to deal with regard to the right of reclamation. In one class the right is based upon the claim of the creditor that he was induced to part with the goods upon the faith of a false statement of a material fact. In the other, the claim to the right has been based upon the general proposition that the bankrupt at the time of making the purchase was insolvent, knew he was insolvent, and had no intention to pay for the goods.

The Petitioner in this case comes within the first category—it *rested its right to reclaim upon a particular false statement of material fact*. It has nowhere, and at no time attempted to rest it upon the doctrine of the second class of cases. The Special Master, however, in reaching his Conclusions of Law ignores this important fact, and apparently deduces his Conclusions upon the theory that the Petitioner's claim is under the second classification.

The Special Master points out in his Conclusions on this phase that "such a proceeding" (referring to

reclamation for fraud) "is not favored, etc." In this the Special Master is completely at variance with every authority to which we have had access. It is quite true that where the right to reclaim is based upon the theory of general statements of the bankrupt as to his solvency, or, upon the theory that the bankrupt was so grossly insolvent that he must have intended to commit fraud, the courts have been reluctant to sustain reclamation, because of the injustice that might result to other creditors, but nowhere, at no time and in no place has any court, insofar as we have been able to discover, indicated any reluctance to relieve a creditor from a contract *induced and based upon a clear mis-statement of material fact.*

That the Special Master reached his Conclusion upon a theory not advanced by the Thomas Company is apparent from his decision which was adopted by the Bankrupt Court.

"In order to be allowed to liquidate its claim, the result of the transaction must be such as to create the right in the Thomas Company to rescind this sale for fraud and reclaim the goods. *Such a proceeding is not favored, and, to support it, the proof must be clear, either that the bankrupt falsely represented solvency when in fact he was insolvent, or, being solvent, falsely represented the extent of its assets, in each case for the purpose of obtaining credit. In this case there does not appear to have been any representation as to solvency. The representation, such as was made, was rather as to the bankrupt's ability to pay. This might be construed to involve a representation as to the extent of the assets, but, if so, I think there is no question but*

that Philip Gevurtz stated conditions frankly and believed, and had reasonable expectations, that the bankrupt would be able to pay for these goods. Under these conditions, as I understand it, the right to rescind does not exist." (Special Master's Report, Petition, page 10.)

It will be noted that at the time at which the bankrupt ordered the rugs from the Howard D. Thomas Co. (some three weeks before the adjudication) the bankrupt was in difficulties and was operating under the guidance of a committee of creditors. It was manifest that no sane creditor would have extended credit under such circumstances in the absence of some special consideration. The special consideration as alleged in the Thomas Company's petition for reclamation, upon which it parted with its goods was the assurance of Philip Gevurtz, President of the bankrupt concern, that the First National Bank of Portland, *had agreed* to advance the sum of one hundred thousand dollars, with which to pay outstanding bills and *meet current obligations*. *This representation was false*. The Thomas Company parted with its goods, believing it to be true. There was no meeting of minds. We therefore contend that the Thomas Company had a right to rescind the contract and to reclaim its goods.

The Special Master found, as a fact, that Thomas, knowing something of Gevurtz's condition, was unwilling to make the arrangement. He also found as a fact that Gevurtz told Thomas not that he was "practically certain" of making arrangements with the First National Bank for the advance of \$100,000.00, but that he "had made" such arrangements. (Special Master's Report, Petition, p. 8.)

The Special Master next found that "Within about thirty days from the date of the shipment negotiations with the bank, for some reason, *fell through* and bankruptcy was precipitated." This is equivalent, of course, to finding that the arrangements had *not* been made as Gevurtz stated, but that negotiations for same were in progress, which is a vitally different proposition. The Special Master, however, interlards his opinion that Gevurtz was acting in good faith, and believed the negotiations were "practically certain" to result as contemplated, and that he found no evidence of fraud or bad faith in Gevurtz's conduct. In this the Special Master is mixing law and fact. We maintain that when a man declares to be true a certain statement within his knowledge, and this statement is material and is false, the declaration is tantamount to a fraud on the party acting upon the faith of the statement, even though the declarant may in good faith believe that *thereafter*, at *some future time*, the facts stated to be existing, will *eventuate*. The maxim is still true that "there is many a slip 'twixt the cup and the lip."

Here was Gevurtz's concern on the eve of bankruptcy, heavily involved, and being steered by a committee of creditors. Application is made by it for a large shipment of rugs. The creditor naturally looks with disfavor upon the order, but is assured that through an arrangement which has been *perfected*, a powerful bank is advancing \$100,000. with which to pay *current bills*, and on the faith of that statement the shipment is made. Three weeks later the doors of the concern are closed, and it develops that no such arrangement had been perfected. The creditor who if the arrangement had really been perfected, would have received 100 cents on the

dollar for the "current obligation," is now asked to take twenty-five cents. Can this be called "good faith," in logic, morals or law?

The Special Master, we submit, viewed the transaction solely from the attitude of the bankrupt, whereas the creditor is also entitled to consideration. The Special Master solved the question against the creditor *because the bankrupt did not in his opinion actually intend to cheat the creditor*. He overlooks entirely the fact that the creditor was cheated; that the creditor is interested in facts, in conditions, in results, not in motives. The Thomas Company was just as much mulcted, created and defrauded when it relied, as it had a right to rely, upon the express statement of material fact, even though made with no intent to defraud, as though it were made pursuance of an evil design. It is small comfort to the Thomas Co. to tell it, "Yes, the President of the bankrupt concern made you an assurance of material fact, which really was not true. You had a right to rely on it. You did rely on it, and you delivered the goods. They were secured from you by a false pretense, but the man who secured them did not intend to cheat you, therefore, be satisfied." We do not believe that the authorities sustain any such absolution or sanctification of what is, at least, fraud in a legal sense, by unctuous protestations of absence of intent to defraud. The matter must be viewed *objectively*, as well as subjectively, and objectively, *conduct* is more important than *motive*.

Waiving, therefore, the consideration that the Special Master in his Conclusions of Law apparently considered principally the question of *solvency*, and to a great extent eliminated the important allegation as to the false

statement, and taking his Finding of Fact that Gevurtz made the representation that his concern *had made* the arrangements with the bank, and that as a matter of fact they had *not* been perfected, but Gevurtz honestly believed they would be consummated, in connection with his *conclusion* that Gevurtz did not intend to defraud, it is apparent that the Special Master evidently believed that criminal fraud is a prerequisite to rescission. The District Court confirmed the Master's position, and we therefore ask the Circuit Court of Appeals to decide on this phase squarely between the position, and the position which we took below, which position, briefly expressed, is as follows:

Where a contract is induced by a statement of material fact made as of his own knowledge by one in position to know its truth or falsity, and the statement is believed and relied on by an innocent party to his damage, and is not true, the transaction is fraudulent as a matter of law, and the innocent party may rescind.

The Special Master to sustain his position in this regard cites three cases (Special Master's Report, Petition, page 10):

In re Burk, 25 Am. B. R. 170;

In re Roalswick, 110 Fed. 639;

In re Davis, 112 Fed. 294.

In the *Berg* case, 25 Am. B. R. 170 (erroneously cited by the Master as in re Burk), the creditor's claim was based upon a statement of assets and liabilities made by the debtor a year and a half before the order was placed. As a matter of fact this statement was substantially true. The creditor's position was based upon

what we have called the second classification, that is the *general intention* on the part of the debtor not to pay his bills. The District Judge affirming the Referee said concerning the bankrupt:

“If he really represented himself as better off in October, 1909, than in December, 1908, *it would make little difference whether he actually knew his own financial condition or not. Of course, he must be held to know what he undertook to represent.*”

In the *Roalswick* case, decided by the District Court for Montana in 1901, no direct representations were involved. The creditor claimed to have made his sale upon the report of a mercantile agency. There was *no* proof of *false* or fraudulent *statements*. The debtor continued in business more than six months after the order was placed. We have no quarrel whatsoever with the decision of the Court. Its position was clearly expressed in the following language:

“There must be such representations or statements to the seller by the buyer, in relation to his commercial standing, financial condition, etc., from which it may reasonably be inferred that if the seller had known or been informed of the true state and condition of the buyer’s affairs, he would not have consummated the sale by a delivery of the goods.”

In the *Davis* case, also decided in 1901, by the District Court for the Southern District of New York, there was *no* proof of *false* representations of *fact*, or that the representations made had been relied on. The creditor claimed that a long time prior to the sale the

debtor had told him that he had assets of two for one as compared to his liabilities. The creditor admitted that he would probably have sold the debtor in the absence of this statement. It is apparent that this comes within what we have called heretofore the second category, dealing with *general statements* as to solvency and insolvency in which the proof must be very clear.

If these cases justify the Conclusion reached by the Referee, then we fail to understand the language of the opinions.

* * * * *

We shall not attempt any exhaustive citation of authorities, but we ask the Court's attention to a few of the decisions on the precise question:

In the case of *Vaughn v. Smith*, 34 Ore. 54, the Court said:

“The defendant's *representations* with regard to the condition of the title to the premises being *false in fact*, though made, as the court finds, ‘*unthoughtedly*,’ and being relied on and acted upon by the plaintiff constituted such *constructive fraud* as will authorize a court of equity to treat the deed as an executory contract to convey and *rescind* the same. * * * *Defendant's representations, therefore, however innocently made, afford no defense to the suit.*” (Italics ours.)

In the matter of *Underwood v. Daniel*, 32 A. B. R. 779, the only question involved was whether it was necessary to show that the misleading statement was made with fraudulent intent. The Court answered it in the negative, citing with approval:

Newman v. Claflin Co., 107 Ga. 89, 32 S. E. 943:

“When a vendee of personal property makes a material representation which is false, and upon which the vendee is induced to act to his injury by parting with the possession of his goods, such a misrepresentation amounts to a fraud in law which voids the sale and equity may rescind the sale and restore the parties to their original rights, *although the party making such misrepresentation was not aware that his statement was false.*” (Italics ours.)

And citing also:

Washburn v. Dannenberg, 117 Ga. 567, 44 S. E. 97:

The law is clearly and tersely laid down by Circuit Judge Hook in Ellett-Kendall Shoe Co. v. Ward, 26 A. B. R. 114; 178 Fed. 982:

“The Referee fell into an error in holding that to constitute a fraud authorizing rescission of a sale, the financial statement by the bankrupt must have been made with intention not to pay. *The rule is broader.* True, when a purchaser buys with intent not to pay, the sale may be rescinded, *but it may also be rescinded regardless of his intent* about paying, if induced by his false and fraudulent representations.”

We have heretofore shown that a careful analysis of the Master's Conclusion will disclose that his opinion is based on a fundamental misconception, and that is, *that the test is whether or not the bankrupt intended or expected to pay*, and whether bankrupt believed itself solvent or insolvent. The Master, apparently, holds

the view that the burden is on Thomas to show actual fraud to the extent of absence of any intent to pay.

We do not believe any reputable authority for such a postulate can be found. The Master, as we have suggested hereinbefore, confused this case with cases where the claim of rescission was based on general charges of fraud arising out of a condition of insolvency existing at the time of purchase. Our claim is not on this basis, but is grounded on a particular and specific false statement of a material matter, and here intention to pay and ignorance of insolvency are not decisive or even material considerations.

In *Pier v. Doheny*, 86 N. Y. Supp. 971, the Court reversed a referee who had found that no intent to defraud existed, the court saying, after pointing out that the statement in question had been made for the purpose of obtaining credit and had been relied upon:

“It follows, therefore, as a matter of course, that G. intended to deceive the plaintiff and thereby secure its property on credit, and such deceit resulted in damage to the plaintiff to the extent of the hops sold and delivered. That was a fraud upon the plaintiff *whether G. believed the property could be paid for or not; whether he intended it should be paid for or not. It was not necessary to find that the purchase was made with a design not to pay for the property in order to render the company liable.*” (Italics ours.)

And in *Mills v. Brill*, 94 N. Y. Supp. 163, the court held that where there was a false statement of financial condition, proof of intention to defraud was not necessary. The court held that when the plaintiff proved

the statement to be false and made for the purpose of obtaining credit, the intent to defraud follows as a necessary inference, saying on this point:

“He may have expected to pay, but the liability was incurred *upon the basis* of a false statement, and the necessary result of his act was to cheat and defraud the plaintiff, *and therefore in law he must be held to have so intended.*” (Italics ours.)

In the case of *In Re Hamilton*, 117 Fed. Rep. 774, the precise question was passed upon, the Trustee appealing from the decision and resting his right of reversal on the contention that to entitle the petitioner to a rescission it was incumbent upon him to show that the purchase was made while the buyer was insolvent, with the pre-conceived design then present in his mind not to pay for the goods. The court thus answered this contention:

“Where a sale of goods is induced by a false and fraudulent representation, *the intention to pay for them does not sanctify the fraud*, and the party defrauded is entitled to rescind *without regard to such intention*. In such a case of active and aggressive fraud, *the question, whether the wrong-doer intended to pay, is immaterial*. The Trustee holds the goods affected with the fraud of the bankrupt. *Neither law nor morals will justify the Trustee in holding goods obtained by fraud of the bankrupt, for the benefit of other creditors. Creditors have no right to profit by the fraud of the bankrupt to the wrong and injury of the party who has been deceived and defrauded.*” (Italics ours.)

The case of *In Re Epstein*, 109 Fed. Rep. 874, is also in point, Epstein having omitted certain indebtedness to his father and children from a statement, claiming that he did not consider them business debts. The referee found that *no fraudulent intent existed*. The Court reversed his findings, pointing out the precise distinction we have referred to, but which the Master entirely disregarded.

“Had the intervenors relied solely upon the fact that the goods were obtained by the bankrupt *with fraudulent intent not to pay for them*, perhaps this contention would be correct; but as a rescission is also asked upon the ground that the goods were obtained upon the *misrepresentations* of the bankrupt, who concealed the fact of his indebtedness to his father and children, the question to be determined is whether such misrepresentations, *although not made in bad faith, nor with fraudulent intent*, are sufficient to entitle the vendor to a rescission. * * * * *In such case the intent is immaterial*. If a buyer knowingly makes false representations concerning material facts and thus induces the seller to part with his goods, the seller may elect to avoid the sale and this without regard to whether the buyer intended to pay for the goods or not. The fraud in such cases consists in statements by the buyer known to be false when made, or made by him when he has no reasonable grounds to believe that they are true. * * * That a sale induced by such false representations may be rescinded, although the purchaser made them with no fraudulent intent, is well settled.”

Judge Lurton, in the case of *In Re Sweeney*, 168 Fed. 612; 21 A. B. R. 866, while denying rescission

because the vendor in that case knew the bankrupt's real condition and took the chances, held that the falsity of a financial statement makes a *prima facie* case for rescission.

In the case of *Turner v. Ward*, 154 U. S. 618, the United States Supreme Court held that rescission should be granted in a case in which it was conceded that the defendant did not know that he was insolvent when he made the misrepresentations. And to the same effect see:

In re Hamilton Furniture & Carpet Co., 117 Fed. 774,

In re Weil, 108 Fed. 987,

In re Davis, 112 Fed. 294.

In re O'Connor, 114 Fed. 777,

Bloomington v. Empire Rubber Co., 114 Fed. 1016,

In re Hildebrand, 120 Fed. 992.

It is apparent therefore that the rule is all but universal that misrepresentation of a material fact, relied upon by the other party, constitutes ground for rescission, the theory being that there was never a meeting of minds, and therefore the transaction was never really consummated. In other words, the contract is voidable by the party deceived. An assignee of the guilty party has, of course, no higher standing than his assignor, and the United States Supreme Court has held that this rule applies to a trustee in bankruptcy—*Donaldson v. Farwell*, 93 U. S. 631.

In view of the pronouncement of the Master that such a proceeding is not favored, we challenge the production of one case in which any court has declared

that it is against the policy of the administration of the bankruptcy laws to allow reclamation where it is based upon a specific false statement of material fact.

It is difficult to see how any court, especially one of equity, can hold any different view than that expressed in *In re Hamilton*, 117 Fed. 774:

“Neither law nor morals will justify the Trustee in holding goods obtained by fraud of the bankrupt, for the benefit of other creditors. Creditors have no right to profit by the fraud of the bankrupt to the wrong and injury of the party who has been deceived and defrauded.”

II.

WAS THERE A BINDING ELECTION, PREVENTING A RESCISSION?

The Special Master found as facts, that after the rugs had been shipped by the Thomas Company, and some few days prior to the adjudication in bankruptcy, Gevurtz called the Thomas Co. over the long distance telephone and expressed a desire to return the rugs. Thomas, the manager and sole owner of the Howard D. Thomas Company, was at this time in the East and the Thomas Company's office refused to authorize the return. However, a traveling salesman employed by the Thomas Company came to Portland and was told by Philip Gevurtz that the situation was desperate, but this salesman had no authority to, and declined to receive the rugs. Gevurtz, notwithstanding this, returned the Thomas & Co. those rugs which were on hand and a day or two later the adjudication occurred.

It will be noted that *there is no finding* that Thomas

& Co. had any *knowledge* at this time that the *statement* with reference to the \$100,000. was *not correct*. It therefore had no knowledge of any facts justifying a rescission. Indeed, the necessary inference from the refusal on the part of the Thomas Co. to authorize the return of the goods is that the concern had no information as to the real situation with regard to the \$100,000. It must be assumed in the absence of some strong reason to the contrary, that Thomas & Company, just as any other concern, would be governed primarily by self interest, and if it had known that the facts existed which permitted a rescission on its part, it is almost a necessary inference that it would have, as a commercial concern, *availed itself of this right*.

Thomas & Co. then filed its proof of claim in bankruptcy for the price of the rugs which had not been returned. There is no suggestion, direct or inferential, that at the time of filing this claim Thomas & Co. had learned of the falsity of Gevurtz's statement as to the advance of \$100,000 by the bank.

The Trustee in bankruptcy filed objection to the claim on the ground that the receipt by Thomas & Co. of the returned rugs constituted a preference. A hearing took place on the objection to the claim, and as a result of the developments at that hearing Thomas & Co. filed a petition for leave to withdraw its proof of claim. The Referee in Bankruptcy *granted* this, and Thomas & Company thereafter filed its petition for leave to liquidate its claim, which petition is in effect, a petition for rescission or reclamation. It is this state of facts which the Referee concludes justifies, as a matter of law, a ruling that Thomas & Co. elected to ratify the sale.

The facts are eloquent: The bankrupt obtained four thousand dollars worth of goods from Thomas on the eve of bankruptcy; the goods were procured with the consent of a committee of creditors of long standing in order to keep the bankrupt's store open; they were procured by misleading Thomas and under circumstances which equity and good morals declare unconscionable. It seems a contradiction in terms to assert that an "equitable" doctrine of election should be invoked to perpetuate such a fraud.

The doctrine of election is useful and important, but equity will be reluctant to invoke it where it will work injustice and where there is no estoppel which calls for it. Certainly equity will insist that the election have been made with *full actual knowledge of the facts*. The Master concludes that Thomas should be charged with knowledge of all facts he *could have ascertained by inquiry*. This is true in some fields of law, but has *never* been so declared as to an *election* which is based on *volition, active, conscious choice between known remedies*.

In support of his ruling in this regard the Special Master cites as his authorities:

In re Droege v. Ahiens etc., Mfg. Co., 163 N. Y. 466;

In re Hildebrandt, 129 Fed. 992.

In the first of these cases, Droege v. Ahiens, the claim of reclamation was based upon the falsity of a statement purporting to show solvency of the bankrupt. This statement indicated a large surplus over liabilities, and a month after it was given to the creditor, the debtor made an assignment. It is apparent that the fact that the assignment followed upon the heels of the statement

showing an excellent financial condition, in itself brought to the creditor *knowledge* that the statement was not a true one. The creditor a few weeks after the assignment filed his proof of claim with the assignee. A month later he filed a mechanics lien on certain premises for material sold the debtor; a month after that time he was writing to ascertain the chances for a dividend, and some six months later, for the first time, notified the assignee that he had elected to rescind. The Court under this state of facts held that he had already elected to affirm the contract, that being the only construction which could be placed upon his filing his proof of claim, and later asserting a mechanics lien.

The court in deciding the case gave full recognition to the doctrine that in order to constitute an election, the *affirmation must be with knowledge of the essential facts*.

The distinction between that case and the instant case is obvious. Gevurtz's bankruptcy did not disprove his assertion that the \$100,000 had been or was being advanced by the bank. Gevurtz owed at this time some several hundred thousand dollars, and the advance by the bank was, according to Gevurtz's statement, being made solely for the purpose of paying small claims and *current obligations*, i. e., of paying people like the Thomas Company, cash for the shipment ordered. Gevurtz's bankruptcy was not necessarily inconsistent with the truth of this statement as to the \$100,000.00, and hence cannot be said to have brought to Thomas Co. knowledge of its falsity.

The other case cited, that of *In re Hildebrandt*, discloses that the court was extremely reluctant to hold an election had taken place, and so ruled because, as it dis-

tinctly pointed out, the creditor had *actual* knowledge of the conditions and in fact filed *simultaneously* two claims, one in *contract* for a portion of the funds, and the other in *tort* for the other portion!

Neither of these cases justifies the Special Master's position that Thomas must be held to have elected, not because he *knew* the representations of Gevurtz to have been false when he filed his proof of claim, but because he was in possession of such facts "*as to put him upon inquiry concerning the same.*"

If "election" were a favorite doctrine with the courts there might be some basis for invoking it, not only where a creditor acts with knowledge, but where he has been put upon inquiry. Election, however, is based upon the principle of estoppel which has been declared to be odious to the courts. *If invoked in this case, it is invoked to validate and perpetuate a fraud and not to prevent one.* Surely the Court will not be alert and diligent toward such a consummation.

We submit that the doctrine is universally approved that where no rights of innocent third parties have intervened, and no change of possession has occurred, the party attempting to invoke the doctrine of election must *affirmatively* show the existence of the *knowledge* which is the fundamental consideration.

This is distinctly held in *Russell v. Wilbur*, 134 N. Y., pages 465-466:

"While the plaintiff might have inserted a direct allegation in his complaint that at the time that he brought the first action he was not aware of the false and fraudulent representations that had been made to him—that is, that he was not aware that the representations made were

false and fraudulent, still I think that the complaint can be fairly construed to state the fact, and the defendant, in order to show that the plaintiff knew it had two remedies, and elected one of them, must by an *answer* and *proof* show to the court that the plaintiff had such knowledge and did in fact make such election."

Prof. Redfield, in his article "Election of Remedies," 15 Cyc. page 261, tersely expresses the theory of election:

"In order to constitute a binding election the party must at the time the election is alleged to have been made have knowledge of the facts from which the co-existing, inconsistent remedial rights arise."

Numerous citations are appended in a note in that volume. In that note occurs also the following illuminating passage:

"Knowledge is not to be imputed as a matter of legal obligation, as the doctrine of election is not properly a rule of positive law, but a rule of practise in equity. In order that a person who is put to his election should be concluded by it, two things are necessary. First, a full knowledge of the nature of the inconsistent rights, and of the necessity of electing between them. Second, an intention to elect manifested, either expressly, or by acts which imply choice and acquiescence."

The Michigan court in *Hogue v. Wells*, 146 N. W. 369, says at page 370, discussing a case where plaintiff

had brought assumpsit and having learned the real facts, dismissed his action and filed one for trover:

“It is well settled that a party cannot waive a right of which he has no knowledge. There can be no waiver unless the person against whom the waiver is claimed had full knowledge of his rights, and of facts which would enable him to take effectual action for the enforcement of such rights.”

So, the Minnesota Court in the case of *Kraise et al. v. Thompson*, 14 N. W. 266, said:

“A rescission proceeds upon the theory that there has been a sale, but voidable at the option of the vendor on the ground of the fraud of the vendee, and that, having discovered this fraud, the vendor asks to avoid it. The invariable rule is that this right to rescind may be exercised upon discovery of the fraud and that no acts in recognition of the existence of the contract of sale, done before such discovery, will amount to an affirmance or ratification, so as to preclude the vendor from rescinding when the grounds for rescission are discovered. Affirmance in ignorance of the facts authorizing rescission will not prevent the affirming party from afterwards rescinding.”

And the New York Court in *Yarter v. Walcott*, 145 N. Y. Supp. 132; 160 App. Div. 125:

“The complaint alleges that the defendant for the purpose of inducing the plaintiff to enter into a contract for the sale of certain merchandise, and for the purpose of obtaining said merchandise,

represented to the plaintiff that he, the defendant, was then solvent and had on hand sufficient money to pay for the same; that the plaintiff, relying upon the representations and induced thereby parted with the merchandise to the defendant; that said statements were false, and were known by the defendant to be false, and that they were made for the purpose of deceiving and defrauding the plaintiff. Upon the trial the evidence was clearly sufficient to justify the jury in finding in favor of the plaintiff, and we are of the opinion that the fact that the plaintiff had previously secured a judgment against the defendant for the amount of the purchase price did not operate to an election of remedies. The facts in relation to the known insolvency of the defendant did not appear, and they were unknown to the plaintiff until the defendant's examination in a bankruptcy proceeding which followed the entry of the plaintiff's judgment in an action brought upon the original contract. Under such circumstances the plaintiff cannot be said to have elected between remedies. He merely pursued the remedy open to him under his contract, and when he found that the contract was founded in fraud he turned to his remedy for fraudulent representations, offering to cancel the judgment on contract; and this court is committed to the doctrine that this practice is lawful."

The leading English case on this subject is *Clough v. London & N. W. Ry. Co.*, 7 Law Rep. 26 (Exchequer). The doctrine of that case has since been followed in England, and adopted in the courts of this country, State and Federal.

The Clough case points out that a contract induced by fraud is not void, but voidable; that where any step has been taken by the defrauded party, the question for decision is whether, with notice of the fraud, he has elected not to avoid the contract, or whether he has made any election. It was pointed out in that case that the mere fact that an action had been brought is not necessarily such a change of position as to preclude the exercise of the right to rescind, the only exception to this right being expressed as follows:

“We think that so long as he has made no election he retains the right to determine it either way, subject to this: that if in the interval whilst deliberating, an innocent third party has acquired an interest in the property, or, if in consequence of his delay the position even of a wrongdoer is effected, it will preclude him from exercising his right to rescind.”

There is no suggestion in this case of the intervention of the rights of any third party, or of any change of position on the part of the bankrupt, or of his trustee.

We invite the Court's especial attention to the full and scholarly opinions in two cases in which the facts are certainly much more nearly apposite to those in the instant case than are the facts in the *In re Hildebrandt* case, cited by the Special Master:

In the case of *In re Stewart*, 24 A. B. R. 474, 178 Fed. 463, the request to withdraw the claim, preliminary to rescission, was made nearly four months after it had been filed and nearly three months after admitted knowl-

edge of the facts, but the court disposed of the contention as to election in the following words:

“It is true that when a person has two inconsistent remedies he may elect which he will pursue, and the election, once fully made, cannot be retracted. But an election of remedies presupposes knowledge of the two remedies, and, as between two causes of action, the one on contract and the other on fraud, a tort, the rule, presupposes a knowledge of the existence of the facts giving a right of action in tort for the fraud.” * * * It is, of course, true that when Mitchell proved his claim he made himself a party to the bankruptcy proceedings, and he is now in this court seeking to establish a lien on the moneys of the bankrupt in bank at the time of the failure on the ground they include his money or deposits, and that the title is in him, and that he is entitled to an order directing the trustee to pay them over to him as the rightful owner. He claims that he has never made a legal election to pursue his remedy by proving his claim as a debt, for the reason he was ignorant of the facts and of his rights, and that his right to withdraw the claim proved is one of which the court cannot deprive him; that he has neither received a dividend nor done any act since informed of the facts which can be construed as a waiver of his right to stand on the fraud or as an election to stand on the claim presented and allowed; and that neither has been done by him at any time that in any way prejudices the rights of other creditors or that has misled them or the trustee.

I do not think it in accord with equity or good conscience to hold that a creditor

of a bankrupt who has been in fact deprived of his property by the fraudulent acts of the bankrupt of which the creditor was ignorant, and who presents his claim as for goods sold and delivered at the first meeting of creditors, and then on a full examination of the bankrupt discovers the fraud, and that he is entitled both in law and equity to a return of his property, is estopped from withdrawing his claim as proved and allowed and proceeding to reclaim the property itself. I do not think it within the power of the court, or referee, to prevent such withdrawal or abandonment of the claim presented. The withdrawal is a matter of right in the creditor, and not a matter of discretion with the referee or judge. This is in accord with Standard Oil Co. of Ky. v. Hawkins, 74 Fed. 395, 20 C. C. A. 468, 33 L. R. A. 739, a case that has been frequently cited and approved. It was there held:

‘When a party who has a choice of two remedies pursues one of them under the mistaken impression that the law affords him no other, and in ignorance of the existence of the other and more advantageous remedy, equity, in the absence of injury to others, or of facts creating an estoppel, may relieve him from the apparent election made under such mistake, and permit him to pursue the more advantageous remedy.’

*The bankruptcy court is a court of equity and is guided, and controlled by equitable doctrines and principles. * * **

“As to laches, something over two months elapsed after discovery of the facts constituting the fraud before the claimant here took decisive steps to withdraw

his claim and take this proceeding. I hardly think this can be held laches. *Clearly no one was harmed; no one changed his position. The trustee did not distribute the estate, and neither he nor the creditors, or any one of them, has changed his position for the worse. Practically the matter stands where it did when the trustee was elected.* I regard it immaterial whether or not Mitchell took part in electing the trustee. His vote did not determine that question. It was necessary for Mr. Mitchell to consult counsel, examine the law, and prepare and serve notices and papers. I do not think the delay, under all the circumstances, was unreasonable. In equity cases it has been held that a delay of months, and even years, in some cases, is not such laches as will bar recovery or the equitable remedy." (Italics ours.)

Another thorough and instructive discussion is found in the opinion in *Standard Oil v. Hawkins*, 74 Fed. 395, 33 L. R. A. 739 (C. C. A. 7th Circuit), where it is said:

"The question is, therefore, whether, and under what circumstances, a party may be relieved from an ill-advised election of a remedy, when the election was made in ignorance that a better remedy was permitted by the law. It is one thing whether a contract will be reformed because entered into through ignorance and mistake of the law by one party, and quite another and different thing whether one may be relieved from an improvident election of a remedy occurring through his ignorance of possessing a better remedy. 'Election,' says Dyer, 'is the internal, free

and spontaneous separation of one thing from another, without compulsion, consisting in the mind and will.' (Bullock v. Burdett, 3 Dyer, 281). That designed selection cannot occur if the party be ignorant of his rights. *He cannot deliberately select one of two or more remedies if he know of but one to which he is entitled.* Therefore it is, as stated by Kerr, that 'an election made by a party under a mistake of facts, or a misconception as to his rights, is not binding in equity. *In order to constitute a valid election, the act must be done with a full knowledge of the circumstances of the case, and the right to which the person put to his election was entitled.*' Kerr, Fraud & Mistake (Am. Ed., notes by Bump), 453. Of course, the assertion by the appellant of a general claim against the bank was, in a sense, inconsistent with its assertion of right to pursue the proceeds of the drafts; and it cannot be allowed to shift its position, if the change would impose detriment, in a legal sense, upon the opposing party. It would then be estoppel, by its conduct. But if there be no estoppel, if no injury has resulted from the remedy pursued, to deny one the right to change position would be to say that a litigant must in the first instance, and at his peril, elect his remedy, and that he may thereafter pursue no other, although ignorance or misconception, he had failed to adopt, notwithstanding his opponent has suffered no detriment from the mistaken course pursued. We do not understand the law to justify so harsh a rule. If the appellant, in ignorance of its legal rights, believed that no other course was available than to prove its debt as general creditor; that it

had no right, because of the fraud of the bank to retake from the receiver the proceeds of the paper tortiously obtained by the bank, the avails of which had come into possession of the receiver; and in such belief proved its claim as a general creditor—equity ought to permit the withdrawal of such claim, and the pursuit of an appropriate remedy, adequate under the circumstances, to restore its property, unless the action of the appellant has wrought a change in the position of affairs, working legal detriment that would render it inequitable for the appellant to pursue now a different course. We understand this to be the rule established, whether the mistake may be deemed a mistake of law or a mistake of fact.” (*Italics ours.*)

The fiction of “election,” as pointed out, is a useful one where third parties will be injured if change of position were permitted. *There is no pretense of any such condition in this case.* The court is aware of the fact that the average business concern has never heard the word “rescind,” and that ordinarily in following its usual course of filing a proof of its claim in bankruptcy, it has no idea of deliberately choosing between known remedies. There is no finding of fact in this case that the Thomas Co. made any choice of remedies, or that it knew at the time of filing its claim that Gevurtz’s statement with regard to the advance from the bank was false. The Master concludes as a matter of law from the facts which he finds that if Thomas Co. had made inquiries it could have found out that Gevurtz made a mis-statement. We have already discussed the fallacy of this observation, based as it is upon the misconception of the scope and purpose of the

theory of election. There is no element of estoppel in this case.

We can add nothing to the force of the strong decision in *In re Stewart*, *supra*, in which the facts with regard to the time at which the claim was withdrawn, etc., are unusually analogous. Nor do we believe that any infirmity can be found in the conclusion of Chief Justice Jenkins, expressed in *Standard Oil v. Hawkins*, *supra*, the language being also particularly applicable to the facts in the instant case.

On the authority of the reasoning of these two judges we ask that the Thomas Company be allowed to rescind, and share with other creditors of the estate to the extent of the damage which it has suffered, and that the Conclusions of the Special Master and of the District Court confirming them be reversed.

Respectfully submitted,

BEACH, SIMON & NELSON,

Attorneys for Petitioner.

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In The United States Circuit Court of Appeals for the Ninth Circuit

HOWARD D. THOMAS COMPANY, a Corporation,
Petitioner,

v.

WM. H. BEHARRELL, WM. C. ALVORD, and ELLIOTT
CORBETT, as Trustees in Bankruptcy of the Estate
of I. Gevurtz & Sons, Bankrupt,
Respondents.

In the Matter of I. GEVURTZ & SONS, Bankrupt.

Respondents' Brief on Petition for Revision

Under Sec. 24b of the Bankruptcy Act of Congress,
Approved July 1, 1898, to Revise, in Matter of
Law, a Certain Order of the United States
District Court for the District of Oregon.

MESSRS. BEACH, SIMON & NELSON,
Solicitors for Petitioner.

MESSRS. REED & BELL,
Solicitors for Respondents.

Filed

MAY 21 1915

F. D. Mouckton,
GREENBAY PRINTING COMPANY
Clerk.

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Circuit Court of Appeals
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District Court for the District of Oregon.

STATEMENT OF THE CASE.

In September, 1913, the petitioner Howard D. Thomas Co., a corporation, organized under the laws of Washington, filed a claim in bankruptcy with the trustees of I. Gevurtz & Sons, a corporation, bankrupt. The petitioner had sold rugs to I. Gevurtz & Sons in the sum of \$3906.36 (Record, p. 4), and as I. Gevurtz & Sons were about to file their petition in bankruptcy, and with knowledge thereof (Record, p. 9) petitioner took back from I. Gevurtz & Sons

rugs to the value of \$2911.60 (Record, p. 4), and a claim was filed for the balance of \$996.26. This was a claim in bankruptcy.

Objections were filed to this claim by the trustees on the ground that the petitioner had received a preference in the shape of said returned rugs (Record, p. 4) and had not surrendered the same.

After the testimony had been taken and briefs filed (pp. 26-28) on these objections before the referee in bankruptcy (Record, pp. 4 and 5) the petitioner asked permission to withdraw its said claim, which permission was granted (Record, p. 5). There is no showing that the claim was withdrawn and there is no order in the record ordering the withdrawal of the claim.

The petitioner thereupon filed in the court below a petition to rescind the sale (Record, pp. 2 to 5). An answer was filed to this petition by the trustees. This answer was not included in the record sent up from the court below, but the same is found in the answer to the petition in this court on pages 24 to 29 of the printed record ending with the words "Wherefore the trustees pray for an order of this court dismissing said petition to liquidate said claim."

Thus in the court below there was filed a petition to rescind the sale and the answer thereto. In other words, the petitioner initiated a controversy in bankruptcy proceedings similar to an action in replevin for the goods.

Upon the issues raised by the petition and answer a trial was had before the special master (p. 6). The master filed findings of fact and conclusions of law (Record, p. 7). The findings of the special master were to the effect that the petition of Howard D. Thomas Company be denied.

Exceptions to the report of the referee were presented and argued to the court below (Record, p. 14).

The court below made a decree as follows, omitting the recitals: "In consideration whereof, it is ordered and adjudged that the findings of the said special master be and the same are hereby affirmed, and that the petition of said Howard D. Thomas Co. to liquidate their said claim be and the same is hereby denied."

The petitioner thereupon presented to this court its petition to revise, under section 24b of the Act. To this petition to revise the trustees filed in this court an answer with a prayer to dismiss, which answer and motion to dismiss sets forth the answer of the trustees in the court below (omitted from the record as aforesaid) and denies the matter set forth by the petitioner in its paragraphs one and two of the prayer of its Petition to Revise, on page 15 of the printed record, which paragraphs one and two seem to be conclusions of fact erroneously deduced by the petitioner.

PETITION TO REVISE DOES NOT LIE.

The trustees and respondents are of the opinion that a Petition to Revise does not lie in this matter.

The facts above set forth and which can be gathered from different statements in the record show that this is in reality a controversy begun by a business house seeking a remedy similar to replevin of goods, claimed by the trustees on behalf of the other creditors to have been sold and delivered, which sale the petitioner claims was a fraudulent sale, therefore subject to rescission. The trustees submit that this is a controversy taken in bankruptcy proceedings which the appellate court can hear only on appeal. In fact, it appears from the brief of the petitioner that this is a plenary suit. The petitioner insists on its right to reclaim and rescind. On page 7 the petitioner states that it rests its right to reclaim upon a particular false statement of material fact, and again on page 21 of its brief says: "Thomas & Company thereafter filed its petition for leave to liquidate its claim, which petition is in effect a petition for rescission or reclamation."

The petition of the petitioner in the court below was to rescind the sale on the ground of fraud. Their petition specifically says: "It became, was and is entitled to rescind the sale thus fraudulently procured and reclaim its rugs with damage for such as cannot be returned." This was denied by the court below, not only on the ground that the petitioner had confirmed the sale by filing its claim in bankruptcy for the total amount without offering to return the preference, but also on the ground that in any event the facts did not justify a rescission of the sale. The petitioner endeavors to have the order

of the court below brought here under section 24b for revision, and as above indicated, the trustees submit that this is a plenary suit and can be and should be brought up only on appeal. That this is so can be gathered from a consideration of conditions that would have existed if the court below had granted the exceptions to the report of the special master and had reversed the special master and had made findings of fact contrary to those of the master. To have then brought the controversy to this court, an *appeal* would have been clearly necessary. The testimony would have been necessary, and the exhibits, and being so under those conditions, it is true under the present conditions. Moreover the remedies are exclusive, as hereinafter further pointed out. Where there is an appeal the Petition to Revise does not lie.

It is the understanding of respondents that section 24b was intended to provide in bankruptcy proceedings a summary and methodical manner by which the bankruptcy practice and proceedings can be regulated in the inferior courts by the appellate court. Section 24b does not seem in itself reasonably to support the view that it can be used to present controversies over property on appeal between litigants.

The bankruptcy act gives every opportunity for appeal, rehearing and review of the decisions of the court below in litigated matters by sections other than 24b, whereby matters involving the rights of parties to property can be presented on the law, or

the facts, or both, to the appellate courts, and by methods which are much more certain and satisfactory to litigants than by petitions to revise. The present case before this court furnishes an illustration. Here the petitioner asks to bring up a question of the fraudulent sale of property, in effect replevin, together with the question of waiver and election, and the record is in such shape, under the Petition to Revise, as to necessitate considerable research to discover what the petitioner is endeavoring to present to this court—whether it is depending upon questions of law, or is trying to inject questions of fact into the proceedings to be revised under section 24b.

This cause should be heard in the appellate court only upon an appeal, for a litigant is not responsible for the form of findings filed by a referee in bankruptcy or of a special master, and in the event such findings are criticised the litigant ought to have a chance to have presented to the court the evidence on which the findings are based to support its claim or substantiate the findings. Moreover, findings are not even required in this case on an appeal.

The respondents submit that in the absence of the exhibits and testimony taken at the hearing before the special master this court is in no position to touch upon the facts, or in any way to overrule, change or modify the decree of the court below.

In the prayer of the petitioner in this court, on page 15, of the record, are the two paragraphs above referred to, whereby the petitioner injects into the

record its own conclusion of law and fact as findings of the referee of the court below. In order to meet this the trustees have filed an answer in this, the appellate court, denying these paragraphs and the alleged findings and conclusions therein erroneously stated.

This certainly is unsatisfactory practice in an appellate court, but is necessitated by the steps taken by the petitioners. In an appeal or method otherwise provided for the decision of controversies in the appellate court by the bankruptcy act, such a condition could not arise.

It would seem that in an appeal or in any proceeding taking to the appellate court a matter involving property rights, or a controversy in bankruptcy proceedings over property rights, the law will not contemplate allowing one party to formulate by petition, or by any act of his own in the appellate court, a new state of facts, and it is for this reason that it can be said that section 24b was intended to cover only matters of proceeding and practice in bankruptcy matters, for in such cases the petition would naturally and inherently be limited to facts made or done by the acts of the court below.

In the many references to section 24b by the courts this view seems to be the one finally evolved.

In re H. H. Loving, Trustee, 224 U. S. 188, (56 Lawyers Ed. 726), the court says:

“The question now propounded is: Was the trustee also entitled to a review in the circuit court of appeals, under section 24b, by petition

for review? Under that section authority, either interlocutory or final, is given to the circuit court of appeals to superintend and revise in matters of law the proceedings of the inferior courts of bankruptcy within their jurisdiction. We think this subdivision was not intended to give an additional remedy to those whose rights could be protected by an appeal under section 25 of the act. That section provides a short method by which rejected claims can be promptly reviewed by appeal in the circuit court of appeals, and, in certain cases, in this court. The proceeding under section 24b, permitting a review of questions of law arising in bankruptcy proceedings, was not intended as a substitute for the right of appeal under section 25. *Coder v. Arts, supra*, p. 233. Under section 24b a question of law only is taken to the circuit court of appeals; under the appeal section, controversies of fact as well are taken to that court, with findings of fact to be made therein if the case is appealable to this court. We do not think it was intended to give to persons who could avail themselves of the remedy by appeal under section 25 a review by petition under section 24b. The object of section 24b is rather to give a review as to matters of law, where facts are not in controversy, of orders of courts of bankruptcy in the ordinary administration of the bankrupt's estate.

“In our judgment the rule was well stated *in re Mueller*, 68 C. C. A. 349, 135 Fed. 711, by Mr. Justice Lurton, then circuit judge (p. 715) :

“ ‘The proceedings reviewable (under section 24b) are those administrative orders and de-

crees in the ordinary course of a bankruptcy between the filing of the petition and the final settlement of the estate, which are not made specially appealable under section 25a. This would include questions between the bankrupt and his creditors of an administrative character, and exclude such matters as are appealable under section 24a.'

"We answer the question certified in the negative."

We have found no later decisions than this, except

Houghton v. Burden, 228 U. S. 165 (57 Lawyers Ed. 782),

decided in 1913, in which the court says:

"But the district court is by section 2 of the bankrupt act of 1898 (30 Stat. at L. 545, chap. 541, U. S. Comp. Stat. Supp. 1911, p. 1491), when sitting as a bankrupt court given jurisdiction in law and equity for the purpose of collecting and distriubting the estate of a bankrupt, and for the purpose of determining controversies relating thereto, except as otherwise provided. The exception has no application here, as Burden voluntarily came into the bankrupt proceeding and submitted his claim to the adjudication of the bankrupt court. Such an intervention for the purpose of asserting a title or claim to property in the possession of the bankrupt's trustee is an intervention in equity, and a decree is reviewable by appeal to the circuit court of appeals in the exercise of its general appellate powers in equity cases under section 24a of the bankrupt act. Loveland, Bankr., 4th ed.,

sections 826 to 829; *Hewit v. Berlin Mach. Works*, 194 U. S. 296, 300, 48 L. Ed. 986, 987, 24 Sup. Ct. Rep. 690; *Knapp v. Milwaukee Trust Co.*, 216 U. S. 545, 54 L. Ed. 610, 30 Sup. Ct. Rep. 412. Upon such an appeal the law and the facts are open for reconsideration, and from the decree of the circuit court of appeals, it not being final (Sec. 128, new Judicial Code, 36 Stat. at L. 1133, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 193), an appeal may be taken under section 241 of the same code."

Earlier decisions from which the rule announced by the Supreme Court may be drawn touch upon the question.

In re Mueller, 135 Fed. 712 *et seq.* 6 Circuit 1905.

Remedy by petition for revision, section 24b, and that by an appeal are mutually exclusive.

Kirsner v. Taliaferro, 202 Fed. 54, 4 Circuit 1912.

The presentation for allowance of a demand against a bankrupt estate is a step in bankruptcy proceedings as to which an appeal is specially provided by section 25.

In re Hartzell, 209 Fed. 776, 8 Circuit 1913.

Where the order and judgment complained of resulted from the consideration of disputed fact and depended upon the findings made thereon, the proper remedy is in an appeal under section 24a.

Wells v. Sharp, 208 Fed. 400, 8 Circuit 1913.

See also *Streator Metal Stamp Co.*, 205 Fed. 281, 7 Circuit 1913.

In any event it is pointed out that the petition filed herein can cover the order of the court as found on page 14 of the printed record and nothing else. The trustees do not believe it was the intention of the bankruptcy act to allow questions of fact in controversies and litigation to be heard in the appellate court without the evidence, and that it was never intended by the bankruptcy act to go behind and beyond the court below by means of any petition to revise.

There is nothing in the law that directs the court of appeals to revise the proceedings of a special master upon a petition to revise, and although the printed record contains the findings of a special master, yet these findings appear to be no part of the record. The act says the proceedings of the court can be revised or superintended upon a petition to revise; and there is nothing in the record upon which the order or decree of the court below can be criticised. The proceedings of the court below are given on page 14 of the printed record, and the proceedings, that is the decree, show the petition of Howard D. Thomas Company was denied.

No findings of fact or conclusions of law of the court below can be found in the record. There is no inherent defect in the order or decree sought to be revised. If the petitioner had appealed it could have brought the entire controversy up for hearing. It is a plenary suit, to use the language of the author-

ities, yet the petitioner is endeavoring to use a petition to revise under section 24b, which limits the jurisdiction of the appellate court to the acts of the court below, the only act in this case being the order or decree on page 14 of the printed record.

Findings of fact and conclusions of law in an appeal are not necessary, this being a real controversy, plenary suit, or litigation in bankruptcy proceedings on an appeal and no findings are required, but the testimony and exhibits are taken up and the upper court on appeal decides the case *de novo*.

In *Houghton v. Burton*, 228 U. S. 165, 57 L. Ed. 782, *supra*, decided in 1913, the court says:

“Being an appeal from a decree in a controversy arising in a bankruptcy proceeding, and therefore, an appeal under section 24a, and not under section 25b, general order 36, made under the latter section, and requiring a finding of facts, has no application, and the appeal opens up the whole case as in other equity cases. *Hewit v. Berlin Mach. Works, supra*; *Coder v. Arts*, 213 U. S. 223, 53 L. Ed. 772, 29 Sup. Ct. Rep. 436, 16 Ann. Cas. 1008, and *Knapp v. Milwaukee Trust Co., supra*.”

IN ANSWER TO PETITIONER'S BRIEF.

The petitioners' brief omits the findings of fact set forth by the special master under the heading “Conclusions of Law,” on page 11 of the printed record, wherein the special master finds that the petitioner was advised at the time it presented its claim in bankruptcy.

The petitioner seems to base its entire case on this point, as indicated on page 23 of its brief, where it is set forth “that in order to constitute an election, the affirmation must be with knowledge of the essential facts.” This from the petitioner’s brief.

The fact of knowledge being established the special master held that the petitioner had elected “between their remedies and elected to become a creditor.” This finding of the special master would seem to dispose of both the two subdivisions of petitioner’s argument. It is immaterial whether it had or had not the right to rescind. With knowledge of the facts it elected to claim payment for goods sold. When petitioner discovered that this was going to involve a question as to the goods it had already taken, it withdrew its claim. It then petitioned “for reclamation” of the goods already treated as sold.

In the case of *Francis v. Bohart*, 147 Pacific, 756, the Supreme Court of Oregon, through Mr. Justice Burnett, says:

“Indeed the weight of authority is to the effect that the commencement of any litigation which depends upon the hypothesis that the title has passed to the purchaser on waiver by the seller constitutes an election which the plaintiff cannot afterwards revoke. In *Hickman v. Richburg*, 122 Ala. 638, 26 South. 136, the plaintiff has contracted to sell lumber to the defendant, reserving the title until the price was paid. It was held that the unsuccessful attempt of the plaintiff to establish a lien upon the structure in which the lumber was used constituted a

waiver of the reservation of title, and that it was an election which barred the attempt to recover the identical property or damages for its conversion. In *Butler v. Dodson*, 78 Ark. 569, 94 S. W. 703, it was decided that bringing an action for the selling price is a waiver of the reservation of title. To the same effect are *Smith v. Barber*, 153 Ind. 322, 53 N. E. 1014; *Alden v. Dyer*, 92 Minn. 134, 99 N. W. 784; *Orcutt v. Rickenbrodt*, 42 App. Div. 238, 59 N. Y. Supp. 1008; *Fredrickson v. Schmittroth*, 77 Neb. 724, 112 N. W. 564; *Mathews Piano Co. v. Markle*, 86 Neb. 123, 124 N. W. 1129; *Sioux Falls Adjustment Co. v. Aikens*, 32 S. D. 154, 142 N. W. 651; *North Robinson Dean Co. v. Strong*, 25 Idaho, 721, 139 Pacific, 847; *Chase v. Kelly*, 125 Minn. 317, 146 N. W. 1113; *Purdy v. Dunn Machinery Co.* (Ga.), 82 S. E. 888; *Frisch v. Wells*, 200 Mass. 429, 86 N. E. 775, 23 L. R. A. (N. S.) 144. In commencing his action for the purchase price of part of the property, the plaintiff adopted the alternative of suing for the price instead of resuming the custody of the property by replevin or recovering damages in trover for its conversion. The contract being single there was a breach of the whole agreement giving rise to but one cause of action for the price. Having proceeded on the plan of recovering the sum stipulated to be paid under the contract for the sale of the property, the judgment rendered in that action is conclusive upon both parties, not only for what was actually litigated, but as to every other matter which the parties might have litigated and settled as incident to and necessarily connected with the subject-matter of the

litigation. *White v. Ladd*, 41 Ore. 324, 68 Pac. 739, 93 Am. St. Rep. 732; *Colgan v. Farmers' and Mechanics' Bank*, 69 Ore. 357, 138 Pac. 1070. Having a grievance against his adversary, a party cannot submit him to the slow torture of multiplied litigation, when the whole matter can be settled in one action or suit. In other words, possessing but a single cause of action, he may not split it up to be used as materials for several actions. *Indiana B. & W. Ry. v. Koons*, 105 Ind. 507, 5 N. E. 549; *Wilson v. Buell*, 117 Ind. 315, 20 N. E. 231; *Willoughby v. Atkinson Furniture Co.*, 96 Me. 372, 52 Atl. 756; *Mallory v. Dawson, etc. Co.*, 32 Tex. Civ. App. 294, 74 S. W. 593.

“In short, the prosecution of the action for the purchase price of part of the property was an irrevocable election to proceed upon the postulate that the title to the property had passed to the purchaser named in the contract. Having entered upon that course, the plaintiff was bound to pursue it consistently to the end. He cannot shift his position and afterwards undertake to recover in specie the property which was the subject of the contract. It having been possible to sue for the whole purchase price, it was his duty to have done so, if he chose to take that remedy at all, and he must be held to have accepted the results of that judgment as a determination of all his rights under the contract. The facts recited appeared without dispute from the pleadings and evidence offered at the trial, and it was the duty of the court to sustain the motion made by the defendant for a verdict in his favor at the close of all the evidence, for,

under the authorities cited, the action of the plaintiff in suing for the price, even of a part of the property, was a waiver of the title, which, having passed from him, he cannot recover possession of the chattels involved. Many other errors are assigned which, in the view we have taken of the case, are unnecessary to be considered. The judgment is reversed."

It can be seen that the petition to revise in this court on page 15 of the printed record, prays certain relief based upon certain statements included in paragraphs one and two of the prayer of the said petition. Said paragraphs one and two, purporting to set forth facts found by the special master and the court below, we submit are argumentative deductions from the findings of fact. The alleged facts in said paragraphs one and two on page 15 in the prayer of the petition cannot be seen in the findings of the referee or master. Moreover, in the answer of the trustees to the petition in this court these paragraphs one and two are specifically denied.

No error can possibly be claimed by the petitioner, other than that the order of the court below was erroneous in matter of law. Such error is predicated upon the said alleged facts in said paragraphs one and two of the petition herein, which paragraphs, as we have before indicated, are conclusions of the petitioner, rather than findings by the master or the court below. In short, we submit that the petitioner is attempting to present to this court by a petition to revise an assumed condition of facts set forth in the prayer of said petition.

As to paragraph one on page 15, we are unable to discover this paragraph in the findings of the referee. The referee says, on page 7: "These negotiations had progressed far enough, as I believe, to induce the officers of the bankrupt generally to believe that the bank intended to and would in a very short time supply it with one hundred thousand dollars, or so much thereof as was necessary to discharge its current merchandise obligations. Indeed, I believe some of the money had already been advanced for this purpose." Which is far from being the situation described by the petitioner herein, to-wit, that the Howard D. Thomas Company had been induced by misstatements made "as" of his own knowledge by the president of the bankrupt concern, which allegation is an allegation of fraud.

The facts further are shown that the petitioner was notified of conditions by Gevurtz, sent a man to Portland, learned of the impending bankruptcy, received back all the rugs there were, and now holds the same.

Also in the original petition, paragraph six, on page four of the printed record, it is alleged, that the "claim in bankruptcy was filed without knowledge at said time of the falsity of the representations hereinbefore referred to." We submit, the findings of fact, beyond which we cannot possibly go, are that there was no fraud, and that the claim was filed with full knowledge of the facts, and with full knowledge of the so-called falsity of the representations.

With regard to paragraph two on page 15 of the printed record, in the prayer of the Petition to Revise, there is clearly another erroneous assumption of fact, to-wit, the said paragraph sets forth that "inasmuch as the so-called election was not made with full knowledge of fact." This has been heretofore referred to, and must have been an oversight on the part of the petitioner, because the findings are that the petitioner's representative came to Portland, talked with Gevurtz, learned the situation, took back the rugs, and kept them, as above stated. Respondents emphasize this, as this is one of the main claims of the petitioner.

Petitioner bases its right to rescind upon the fact that the claim was filed in ignorance of the facts; yet the only fact that the court can possibly consider, if the court can consider any facts, are the facts in the report of the special master, to the effect that the petitioner had knowledge when he filed his bankruptcy claim. To demonstrate this, I. Gevurtz & Sons' bankruptcy petition was not filed and they had not been adjudicated bankrupt when the petitioner's representative came to Portland and took back his rugs and had his talk with Gevurtz, when Gevurtz told him he was going into bankruptcy. Therefore, the petitioner knew before it filed its claim in bankruptcy all the facts.

Therefore, instead of the election having been made without full knowledge of the facts, on the contrary, before this court on the Petition to Revise, the election was made with full knowledge of the facts.

The referee says, "Knowing all these circumstances and being bound to take them into consideration, it does not seem to me that they were not advised of the alleged false representations of Gevurtz at the time they filed their claim before the referee, and that in so doing they elected between their remedies and asked to become a creditor."

The petitioner likewise complains that Thomas & Company were cheated, and this is a prominent feature in its argument. Yet this is not so and is not substantiated. If the evidence and exhibits were at hand no such claim would be made by petitioner; but even on the incomplete record before this court it can be seen that Thomas & Company were not cheated. The petitioner complains that the attitude of the court below was that of the bankrupt as against a creditor, and in so complaining overlooks the fact that the trustees represent all the creditors, and that this is not a controversy between the bankrupt and Thomas & Company, but is a controversy between Thomas & Company and the other creditors who are represented by the trustees. That this is not a controversy between the bankrupt and Thomas & Company is shown by the fact that Thomas & Company and the bankrupt are represented by the same counsel (Printed Record, page 28). If there was a controversy between the bankrupt and Thomas & Company they could not be represented by the same counsel. And in view of the findings of the referee to the contrary, the petitioner's declaration that it has been cheated seems to be immaterial.

The respondents submit that this controversy cannot be heard in the Appellate Court on a Petition to Revise, and in any event there is nothing that this Honorable Court can or should revise or superintend, as shown by the record herein.

Respectfully submitted,

SANDERSON REED,

C. A. BELL,

Solicitors for Respondents.

United States
Circuit Court of Appeals
For the Ninth Circuit.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
a Corporation, CHICAGO, MILWAUKEE & PUGET SOUND
RAILWAY COMPANY, a Corporation, J. E. WOODS and
M. I. CHAPPELL,

Plaintiffs in Error,

vs.

DAVID CLEMENT, as Administrator of the Estate of DAVID
CLEMENT, JR., Deceased,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the
District of Montana.

Filed

MAR 12 1915

F. D. Monckton,
Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
a Corporation, CHICAGO, MILWAUKEE & PUGET SOUND
RAILWAY COMPANY, a Corporation, J. E. WOODS and
M. I. CHAPPELL,

Plaintiffs in Error,

vs.

DAVID CLEMENT, as Administrator of the Estate of DAVID
CLEMENT, JR., Deceased,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the
District of Montana.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys of Record.

GEO. F. SHELTON, Esq., of Butte, Montana,

FRED J. FURMAN, Esq., of Butte, Montana.

A. J. VERHEYEN, Esq., of Butte, Montana,

Attorneys for Defendants and Plaintiffs in Error.

BURTON K. WHEELER, Esq., of Butte, Montana,

HOMER G. MURPHY, Esq., of Helena, Montana,

Attorneys for Plaintiff and Defendant in Error.

[Transcript on Removal.]

*In the District Court of the United States, in and for
the District of Montana.*

No. 124.

DAVID CLEMENT, as Administrator of the Estate
of DAVID CLEMENT, Jr., Deceased,

Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAIL-
WAY COMPANY, a Corporation, CHI-
CAGO, MILWAUKEE AND PUGET
SOUND RAILWAY COMPANY, a Corpora-
tion, J. E. WOOD and M. J. CHAPPEL,

Defendants.

BE IT REMEMBERED that on the 31st day of
March, 1913, there was filed in the above-entitled
court a Transcript on Removal from the District
Court of the Second Judicial District of the State of

2 *Chicago, Milwaukee & St. Paul Ry. Co. et al.*

Montana, in and for the County of Silver Bow, which said Transcript on Removal contains an Amended Complaint in the words and figures following, to wit:
[1*]

*In the District Court of the Second Judicial District
of the State of Montana, in and for the County of
Silver Bow.*

DAVID CLEMENT, as Administrator of the Estate
of DAVID CLEMENT, Jr., Deceased,
Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAIL-
WAY COMPANY, a Corporation, CHI-
CAGO, MILWAUKEE AND PUGET
SOUND RAILWAY COMPANY, a Corpora-
tion, J. E. WOOD and M. J. CHAPPEL,
Defendants.

Amended Complaint.

Comes now the plaintiff above named and files this his amended complaint and for cause of action against the above-named defendants complains and alleges, as follows:

I.

That David Clement, Jr., died on the 5th day of November, 1912.

II.

That by an order and judgment duly given and made by the above-entitled Court on the 23d day of November, 1913, plaintiff was appointed administra-

*Page-number appearing at foot of page of original certified Record.

tor of the estate of David Clement, Jr., that he, the plaintiff, immediately on the 23d day of November, 1912, qualified as such administrator and is now the duly appointed, acting and qualified administrator of the estate of David Clement, Jr., deceased.

III.

That the defendant the Chicago, Milwaukee and St. Paul Railway Company is a corporation, duly organized and existing and doing business in the State of Montana. [2]

IV.

That the defendant, Chicago, Milwaukee and Puget Sound Railway Company, at all times herein mentioned was a corporation organized and existing and was at such times the owner and operator of a certain railroad system comprising of tracks, rolling stock and other appurtenances, said railroad system running through and across the county of Silver Bow and the city of Butte, and particularly across that certain public street in the city of Butte known as Montana Street, said crossing being near the junction of Greenwood Street with the said Montana Street. That said street at said crossing is in a thickly populated portion of said city and county and at all times many people travel upon the same, all of which was known to the defendants.

V.

That on the 5th day of November, 1912, David Clement, Jr., was a boy of about the age of fifteen years; that on the said day J. E. Woods was an engineer in the employ of the defendant Chicago, Milwaukee and Puget Sound Railway Company and a

servant of said company, driving a steam locomotive, being operated by the said company on one of its tracks at the time of the accident hereinafter mentioned; that M. J. Chappel was in the employ of the defendant Chicago, Milwaukee and Puget Sound Railway Company as foreman of an engine crew, and at the time of the accident hereinafter referred to was riding upon the engine operated by the said defendant Woods and directed the movement of said engine.

VI.

That on the morning of the 5th day of November, 1912, at about the hour of four o'clock, the said David Clement, Jr., was driving a pair of horses and riding in an enclosed milk-wagon, [3] which was being drawn by said horses, going in a northerly direction on Montana Street, a public street in the incorporated city of Butte, Montana, toward and near the intersection of the defendant Chicago, Milwaukee and Puget Sound Railway Company's tracks and said Montana Street (said crossing being near Greenwood Street in said city), and was not observant of the approach of a train which was running along said track in a westerly direction—the engine being under the control of the said J. E. Woods and the said Chappel and being used at the time for switching purposes in the yards of the said Chicago, Milwaukee and Puget Sound Railway Company; that the said David Clement, Jr., was coming directly within the way of the said approaching train; that the said engineer and the said Chappel did see the said David Clement, Jr., or by the exercise of

ordinary care could have seen him, coming directly within the path of the said engine, and did see or by the exercise of reasonable care on their part, could have seen, that the said boy was in danger of being struck by the said engine, and that the boy was unobservant of the approach of said engine; that the defendants then, after so seeing the boy in danger, negligently and carelessly drove said engine against the vehicle in which the said David Clement, Jr., then and there was, without giving him any warning of the approach of said train and without lowering the gates which were at the said crossing, and by reason of the negligent management and operation of said engine, the said Clement boy was dragged by the same over and along the ground and over and along the railroad track for a great distance, and was drawn and dragged under the wheels of said engine, and the same was then and there run and driven over him, whereby he was crushed, maimed and injured, from which injuries he thereafter died. [4]

VII.

That at all times specified herein the above-mentioned Chappel and the above-mentioned Wood were acting within the course of their employment.

VIII.

That the said David Clement, Jr., was a strong and able-bodied lad of fifteen years of age, of good capacity for and disposition to work, and would have earned much money after he became twenty-one years of age and would have enjoyed a long and happy life.

That the said David Clement, Jr., lived an appreciable length of time after the accident.

IX.

That on or about the 24th day of December, 1912, the defendant Chicago, Milwaukee and Puget Sound Railway Company, a corporation, sold, transferred, set over and assigned and conveyed all of its railroad and property in the State of Montana and elsewhere to the Chicago, Milwaukee and St. Paul Railway Company, a corporation; that in and by the terms of the said sale and transfer of the said property aforesaid from the Chicago, Milwaukee and Puget Sound Railway Company to the Chicago, Milwaukee and St. Paul Railway Company, a corporation, the said Chicago, Milwaukee and St. Paul Railway Company, a corporation, assumed all of the debts and obligations of every kind and character of the said Chicago, Milwaukee and Puget Sound Railway Company, and entered upon the operation and management of the said railroad business formerly conducted by the Chicago, Milwaukee and Puget Sound Railway Company.

X.

That by the acts of negligence on the part of the above-named defendants hereinbefore set out, the said David Clement, Jr., was [5] damaged by the defendants in the sum of Twenty-five Thousand (\$25,000) Dollars; that between the time when the injury was inflicted upon him and the death of the said David Clement, Jr., he had a cause of action against the defendants for said injuries; that the cause of action has survived to this administrator of

his estate and is now prosecuted.

WHEREFORE, plaintiff demands judgment against defendants for the sum of Twenty-five Thousand (\$25,000) Dollars, and for costs of suit.

B. K. WHEELER,
Attorney for Plaintiff.

State of Montana,
County of Silver Bow,—ss.

David Clement, as administrator of the estate of David Clement, Jr., deceased, being first duly sworn, on oath deposes and says: That he is the party named as plaintiff in the above and foregoing complaint; that he has read the said complaint and knows the contents thereof, and that the matters and things therein stated are true of his own knowledge except those matters and things therein stated on information and belief, and as to those he believes them to be true.

DAVID CLEMENT.

Subscribed and sworn to before me this —— day of February, 1913.

[Notarial Seal] B. K. WHEELER,
Notary Public for the State of Montana, Residing
at Butte, Montana.

My commission expires February 15th, 1915.

Service of the above and copy rec'd Feb. 13, 1913.

GEO. F. SHELTON,
FRED J. FURMAN,
A. J. VERHEYEN.

Filed Feb. 13, 1913. John J. Foley, Clerk.

Filed Mar. 31, 1913. Geo. W. Sproule, Clerk.

That said Transcript on Removal filed herein on the said 31st day of March, 1913, contains a Separate Demurrer of defendant Chicago, Milwaukee and St. Paul Railway Company, in the words and figures following, to wit: [7]

*In the District Court of the Second Judicial District
of the State of Montana, in and for the County
of Silver Bow.*

No. A—4799.

DAVID CLEMENT, as Administrator of the Estate
of DAVID CLEMENT, Jr., Deceased,
Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAIL-
WAY COMPANY, a Corporation, CHI-
CAGO, MILWAUKEE AND PUGET
SOUND RAILWAY COMPANY, a Corpora-
tion, J. E. WOODS and M. J. CHAPPEL,
Defendants.

**Separate Demurrer of Defendant Chicago, Mil-
waukee and St. Paul Railway Company, a Cor-
poration.**

Comes now the above-named defendant Chicago, Milwaukee and St. Paul Railway Company, a corporation, and demurs to the amended complaint of the plaintiff on file herein; and, for cause of demurrer, alleges: That said amended complaint does not state facts sufficient to constitute a cause of action in favor

of the plaintiff and against this demurring defendant.

GEORGE F. SHELTON,
FRED J. FURMAN,
A. J. VERHEYEN,

Attorneys for Demurring Defendant.

Service of the above and foregoing Demurrer is hereby acknowledged, and copy thereof received, this 4th day of March, 1913.

B. K. WHEELER,
Attorney for Plaintiff.

Filed Mar. 4, 1913. John J. Foley, Clerk.

Filed Mar. 31, 1913. Geo. W. Sproule, Clerk. [8]

That said Transcript on Removal filed herein on the 31st day of March, 1913, contains a Separate Demurrer of the defendant M. J. Chappel, in the words and figures following, to wit: [9]

*In the District Court of the Second Judicial District
of the State of Montana, in and for the County
of Silver Bow.*

No. A—4799.

DAVID CLEMENT, as Administrator of the Estate
of DAVID CLEMENT, Jr., Deceased,
Plaintiff,

vs.

CHICAGO, MILWAUKEE AND ST. PAUL
RAILWAY COMPANY, a Corporation,
CHICAGO, MILWAUKEE AND PUGET
SOUND RAILWAY COMPANY, a Corpora-
tion, J. E. WOODS and M. J. CHAPPEL,
Defendants.

Separate Demurrer of Defendant M. J. Chappel.

Now comes the above-named defendant M. J. Chappel, and demurs to the amended complaint of the plaintiff on file herein, and for cause of demurrer, alleges: That said amended complaint does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against this demurring defendant.

GEORGE F. SHELTON,
FRED J. FURMAN,
A. J. VERHEYEN,

Attorneys for Demurring Defendant.

Service of the above and foregoing demurrer is hereby acknowledged, and copy thereof received, this 4th day of March, 1913.

B. K. WHEELER,
Attorney for Plaintiff.

Filed Mar. 4, 1913. John J. Foley, Clerk.

Filed Mar. 31, 1913. Geo. W. Sproule, Clerk.
[10]

That said Transcript on Removal filed herein on the 31st day of March, 1913, contains a Separate Demurrer of the defendant J. E. Woods, in the words and figures following, to wit: [11]

*In the District Court of the Second Judicial District
of the State of Montana, in and for the County
of Silver Bow.*

No. A—4799.

DAVID CLEMENT, as Administrator of the Estate
of DAVID CLEMENT, Jr., Deceased,
Plaintiff,

vs.

CHICAGO, MILWAUKEE AND ST. PAUL
RAILWAY COMPANY, a Corporation,
CHICAGO, MILWAUKEE AND PUGET
SOUND RAILWAY COMPANY, a Corpora-
tion, J. E. WOODS and M. J. CHAPPEL,
Defendants.

Separate Demurrer of Defendant J. E. Woods.

Now comes the above-named defendant J. E. Woods, and demurs to the amended complaint of the plaintiff on file herein; and alleges that the said amended complaint does not state facts sufficient to constitute a cause of action against said defendant and in favor of the plaintiff.

GEORGE F. SHELTON,
FRED J. FURMAN,
A. J. VERHEYEN,

Attorneys for Demurring Defendant.

Service of the above and foregoing demurrer is hereby acknowledge, and copy thereof received,

12 *Chicago, Milwaukee & St. Paul Ry. Co. et al.*

this 6th day of March, 1913.

B. K. WHEELER,
Attorney for Plaintiff.

Filed Mar. 6, 1913. John J. Foley, Clerk.

Filed Mar. 31, 1913. Geo. W. Sproule, Clerk.
[12]

[Order Overruling Demurrers, etc.]

Thereafter, on May 14, 1913, order overruling demurrers was duly made and entered herein, in the words and figures following, to wit:

*In the District Court of the United States, District
of Montana.*

No. 124.

DAVID CLEMENT, Adm.

vs.

CHICAGO, MILWAUKEE & PUGET SOUND
RY. CO. et al.

By consent of counsel, demurrers overruled and defendants granted 20 days to file answer.

Attest: A true copy of minute entry, May 14, 1913.

[Seal]

GEO. W. SPROULE,
Clerk.

By Harry H. Walker,
Deputy Clerk. [13]

That thereafter, on the 3d day of June, 1913, an Answer to the Amended Complaint was duly filed herein, in the words and figures following, to wit:
[14]

*In the District Court of the United States, for the
District of Montana.*

No. 124.

DAVID CLEMENT, as Administrator of the Estate
of DAVID CLEMENT, Jr., Deceased,
Plaintiff,

vs.

CHICAGO, MILWAUKEE AND ST. PAUL
RAILWAY COMANY, a Corporation,
CHICAGO, MILWAUKEE AND PUGET
SOUND RAILWAY COMPANY, a Corpor-
ation, J. E. WOODS, and M. I. CHAPPEL,
Defendants.

Answer to Amended Complaint.

Now come the defendants above named; and, for their answer to the amended complaint of the plaintiff on file herein, admit, deny, and allege:

I.

Admit the allegations of the said amended complaint contained in paragraphs I, II, III, V, VII, and IX.

II.

Deny the allegations contained in the last sentence of paragraph numbered IV of said amended complaint.

Admit each and every other allegation contained in said paragraph numbered IV of said amended complaint.

III.

As to the allegations of paragraph numbered VI of said amended complaint, defendants admit that on the 5th day of November, 1912, at about four o'clock in the morning, David Clement, Jr., was driving a pair of horses attached to an enclosed milk-wagon, going in a northerly direction on [15] Montana Street, a public thoroughfare in Butte, toward and near the intersection of the defendant company's railway tracks and Montana Street.

Admit that J. E. Woods was engineer, and M. I. Chappel was foreman of the switching crew.

Admit that the gates were not lowered at that time and place; and admit that David Clement was at that time and place killed in a collision.

Deny each and every other allegation in the said paragraph numbered VI contained.

IV.

Deny any knowledge or information sufficient to form a belief as to the allegations contained in paragraph numbered VIII of said amended complaint.

V.

Deny each and every other allegation in the said amended complaint contained, not hereinbefore specifically admitted or denied.

WHEREFORE, having fully answered, defend-

ants pray to be hence dismissed, with their costs in this behalf expended.

GEORGE F. SHELTON,
FRED J. FURMAN,
A. J. VERHEYEN,
Attorneys for Defendants. [16]

State of Montana,
County of Silver Bow,—ss.

Fred J. Furman, being first duly sworn according to law, deposes and says: That he is one of the attorneys for the above-named defendants, and makes this affidavit of verification on behalf of said defendants for the reason that none of the said defendants or the officers of said corporation defendants above named are at this time present in the County of Silver Bow, State of Montana (where affiant resides), and therefore cannot make said affidavit on behalf of said defendants, or any of them. That affiant has read the above and foregoing Answer, and knows the contents thereof; and that the same is true according to the best knowledge, information, and belief of affiant.

FRED J. FURMAN.

Subscribed and sworn to before me this 3d day of June, 1913.

[Seal]

A. J. VERHEYEN,
Notary Public for the State of Montana, Residing at
Butte, Montana.

My Commission expires Jan. 23, 1915.

Service of the above and foregoing answer is here-

16 *Chicago, Milwaukee & St. Paul Ry. Co. et al.*

by acknowledged, and copy thereof received, this 3d day of June, 1913.

B. K. WHEELER,
Attorney for Plaintiff.

Filed June 3, 1913. Geo. W. Sproule, Clerk. [17]

And thereafter, on the 22d day of May, 1914, the Verdict of the jury was duly filed and entered herein, in the words and figures following, to wit: [18]

In the District Court of the United States, District of Montana.

No. 124.

DAVID CLEMENT, as Administrator of the Estate
of DAVID CLEMENT, Jr., Deceased,
Plaintiff,

vs.

CHICAGO, MILWAUKEE AND ST. PAUL
RAILWAY COMPANY, a Corporation,
CHICAGO, MILWAUKEE & PUGET
SOUND RAILWAY COMPANY, a Corpor-
ation, J. E. WOODS, and M. I. CHAPPEL,
Defendants.

Verdict.

We, the jury in the above-entitled cause, find our verdict in favor of David Clement, as administrator of the Estate of David Clement, Jr., deceased, and against the defendants, and we assess the damages of the plaintiff at the sum of \$7,500.00, Seven Thousand and Five Hundred Dollars.

PARKER RAND,
Foreman.

Filed May 22, 1914. Geo. W. Sproule, Clerk.
[19]

And thereafter, on the 28th day of May, 1914, a Judgment was duly rendered and entered herein, in the words and figures following, to wit: [20]

In the District Court of the United States, District of Montana.

DAVID CLEMENT, as Administrator of the Estate
of DAVID CLEMENT, Jr., Deceased,
Plaintiff,

vs.

CHICAGO, MILWAUKEE AND ST. PAUL
RAILWAY COMPANY, a Corporation,
CHICAGO, MILWAUKEE & PUGET
SOUND RAILWAY COMPANY, a Corpor-
ation, J. E. WOODS, and M. I. CHAPPEL,
Defendants.

Judgment.

BE IT REMEMBERED that on the 20th day of May, A. D. 1914, at the courtroom at Butte, Montana, in the above-entitled district, the above-entitled cause came on for hearing and trial, Burton K. Wheeler and Homer G. Murphy representing the plaintiff, and Geo. F. Shelton, Fred J. Furman and A. J. Verheyen representing the defendant; a jury of twelve good and lawful men was regularly impaneled and sworn to try the cause; evidence was introduced from sworn witnesses on behalf of the plaintiff and evidence was introduced from sworn witnesses on behalf of the defendant; counsel for the respective par-

ties argued the cause to the jury; the court thereupon delivered to the jury its charge and instructions and thereupon the jury retired to consider of their verdict and subsequently on the 22d day of May, A. D. 1914, returned into court with their verdict in words and figures as follows:

(After Title of Court and Cause.)

We, the jury in the above-entitled cause, find our verdict in favor of David Clement, as Administrator of the Estate of David Clement, Jr., deceased, and against the defendants, and we assess the damages of the plaintiff at the sum of \$7,500.00— [21] Seven Thousand and Five Hundred Dollars.

PARKER RAND,

Foreman.

And thereupon and by virtue of the premises, it is ORDERED, ADJUDGED and DECREED that David Clement, as administrator of the estate of David Clement, Jr., deceased, have and recover of and from the Chicago, Milwaukee and St. Paul Railway Company, a corporation; the Chicago, Milwaukee and Puget Sound Railway Company, a corporation; J. E. Woods and M. I. Chappel, the sum of Seven Thousand Five Hundred Dollars (\$7,500.00), together with costs taxed at the sum of One Hundred Sixty-four 10/100 Dollars, and also interest on both of said amounts at the rate of eight per cent per annum from date hereof until paid, and that he have execution therefor.

Judgment rendered and entered this 28 day of May, A. D. 1914.

GEO. W. SPROULE,
Clerk. [22]

Thereafter, on the 19th day of June, 1914, Petition for a New Trial was duly filed herein, in the words and figures following, to wit: [23]

*In the District Court of the United States, for the
District of Montana.*

No. 124.

DAVID CLEMENT, as Administrator of the Estate of DAVID CLEMENT, Jr., Deceased.
Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a Corporation, CHICAGO, MILWAUKEE & PUGET SOUND RAILWAY COMPANY, a Corporation, J. E. WOODS and M. J. CHAPPELL.

Defendants.

Petition for a New Trial.

Now come the above-named defendants, and petition the Court for a new trial of said cause for the following causes materially affecting the substantial rights of the losing parties in said cause, to wit:

1. Excessive damages appearing to have been given under the influence of passion or prejudice.
2. Insufficiency of the evidence to justify the verdict.

3. Errors in law occurring at the trial.

And, as a specification of the particular errors of law occurring at the trial and relied upon by petitioners, they offer the following, to wit:

1. The Court erred in refusing to grant the motion of the defendants for the Court to instruct the jury to find a verdict for the defendants upon the close of all the testimony in the cause. [24]

And, as a specification of the particulars wherein the evidence is claimed to be insufficient to support the verdict, petitioners set forth and aver the following, to wit:

1. The plaintiff, in order to recover in this action, under the pleadings, must have established by the testimony in the case that the deceased, David Clement, Jr., survived an appreciable length of time after having been hit, and that death was not instantaneous; and there was no evidence whatever introduced at the trial of the cause that the plaintiff did survive any appreciable time, but, on the contrary, the evidence is uncontradicted that death was instantaneous.

2. In order for the plaintiff to recover in this action, it was necessary for him to establish by the testimony in the case that the accident was caused by the negligence of the defendants, and the plaintiff's intestate, David Clement, Jr., was not guilty of concurrent negligence which resulted in the accident and his death; and the uncontradicted testimony in the case is that said David Clement, Jr., was guilty of concurrent negligence which directly caused the accident and resulted in his death.

This petition will be made upon the files and records in this case; and upon the minutes of the Court, including the clerk's minutes and any notes or memoranda which may have been kept by the judge during the trial; and also upon the reporter's transcript of his shorthand notes; and also upon the bill of exceptions prepared and served and to be hereafter settled, allowed, and filed in this cause.

Dated June 19, 1914.

SHELTON & FURMAN,
A. J. VERHEYEN,
Attorneys for Defendants. [25]

Service of the above and foregoing Petition for a New Trial is hereby accepted, and copy thereof received, this 19th day of June, A. D. 1914.

B. K. WHEELER,
H. G. MURPHY,
Attorneys for Plaintiff.

I hereby certify that in my opinion the within and foregoing petition for a new trial is well founded in point of law.

GEORGE F. SHELTON,
Of Counsel for Defendants.

Filed June 19, 1914. Geo. W. Sproule, Clerk.
[26]

That on the 5th day of December, 1914, the Memo. Opinion and Order of the Court Denying Motion for New Trial was duly filed herein, in the words and figures following, to wit: .[27]

[Memorandum Opinion on Petition for a New Trial.]

In the District Court of the United States, District of Montana.

No. 124.

DAVID CLEMENT, Adm.,

Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RY. CO.
et al.,

Defendants.

Defendant moves for a new trial principally upon the ground that the evidence is insufficient to sustain the verdict in that plaintiff did not sustain the burden to establish that his intestate lived an appreciable time after the latter's injuries due to defendant's negligence.

From the most favorable and reasonable aspect that the evidence presented to the jury it appears the deceased in a loaded and enclosed milk-wagon having a glass front and side doors, drove at a slow trot or about five miles per hour along a street eighty feet wide and upon defendant's track crossing the street, and there the wagon was struck by the sloping rear of defendant's switch-engine drawing twelve loaded cars and backing westerly at about

six miles per hour. The engineer had discovered the wagon and applied the brakes. The wagon half supported by the rear of the engine was pushed along the track for about two hundred and fifty feet and until the train stopped. Though the wagon was "smashed" its appearance inspired examination for the driver. Not being found therein further search disclosed deceased's mangled body under the cars and about one hundred or more feet west of the street. Blood first appeared about fifty feet from the street and of severed portions of the body the first was about ninety feet from the street. Deceased's head had been severed at [28] the bridge of the nose, "the top gone all the brains scattered," the left arm had been severed between elbow and shoulder, the left leg at the knee and the right leg just above the shoe top. No other marks or "scratches" appeared upon the body. When found deceased was dead. There was testimony of a sometime in this matter forsworn witness, apparently serving a possible necessity in language nicely calculated to meet the requirements of some authorities, that when found the body "was gasping," in reference to which the Court instructed the jury they should not credit the incredible, believe miracles, however positively sworn to. Counsel now contend the witness' credibility and whether or not the deceased was so breathing when found were for the jury,—somewhat daring, to put it mildly.

If the verdict depended in any degree upon the testimony of said witness, a new trial ought to and would be granted. It is clear, however, that the

evidence is of quality and quantity that the case remains unimpeached by said witness and justifies a verdict for plaintiff. From all the facts and circumstances the jury could and did reasonably infer that the collision, not of severity, did not kill deceased and that he lived until he fell from the wagon and was fatally ran over by the train wheels; that this latter occurred where blood first appeared or where the severed part of the body nearest the street was found or where the body was found. This is not mere conjecture but a probable inference that reasonable men might draw. Life is a fact of continuing nature and is presumed to endure so long as in the nature of things it reasonably might; and he who denies it has the burden to overcome the presumption by evidence to the contrary.

At the time of the collision the speed of the train was about $8 \frac{4}{5}$ feet per second and constantly decreased, so that the elapsed time from the point of collision in the center of the street to the points aforesaid, respectively separated by ninety, one hundred and thirty and one hundred and forty feet and more, was at least ten, [29] fifteen and sixteen seconds, respectively. The deceased living so long after the impact, in either case lived an appreciable time, that is, a time capable of measurement, and this cause of action accrued to and survived him. To the contention that death was instantaneous in that it occurred before defendant's negligence ended, it is proper to observe that from a tort of a continuing nature a cause of action accrues at the tort's inception—at the first violation of the

tort-feasor's duty and invasion of the injured person's right, and is not postponed until the tort's end. If one is continuously beaten with gradually increasing force until after some minutes death supervenes, it cannot be successfully contended that death was instantaneous and so either prevented a cause of action from arising or destroyed the cause of action that accrued when the first blow was struck. No more can it in this case of a continuing negligent tort.

The motion is denied.

Filed Dec. 5, 1914. Geo. W. Sproule, Clerk.
[30]

That on February 3, 1915, defendants' bill of exceptions, signed, settled and allowed on October 19, 1914, was duly filed herein, being in the words and figures following, to wit: [31]

*In the District Court of the United States, for the
District of Montana.*

No. 124.

DAVID CLEMENT, as Administrator of the Estate of DAVID CLEMENT, Jr., Deceased,
Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a Corporation, CHICAGO, MILWAUKEE & PUGET SOUND RAILWAY COMPANY, a Corporation, J. E. WOODS and M. J. CHAPPELL,
Defendants.

Bill of Exceptions.

BE IT REMEMBERED, that, in the above-entitled action, David Clement, as administrator of the Estate of David Clement, Jr., deceased, plaintiff above named, brought his suit against the Chicago, Milwaukee and Puget Sound Railway Company, a corporation, J. E. Woods, and M. J. Chappell, to recover the sum of \$25,000 because of the death of David Clement, Jr., from personal injuries alleged to have been suffered by the said David Clement, Jr., at the time and in the manner specified in the complaint herein and also in the amended complaint on file herein. [32]

Upon the issues raised by the amended complaint (in which the Chicago, Milwaukee & St. Paul Railway Company, a corporation, was joined as a party defendant in said action), and the answer of the defendants to said amended complaint, the said cause came on for trial on May 20, 1914, before the Court and a jury of twelve persons impanelled and sworn to try the issues in said cause, B. K. Wheeler and Homer G. Murphy, Esqs., appearing as counsel for plaintiff, and Messrs. Shelton & Furman and A. J. Verheyen appearing as counsel for defendants.

Whereupon the following proceedings were had and done, the rulings of the Court hereinafter set forth were made, and the exceptions of the defendants thereto noted: [33]

[Testimony of William Willoughby, for Plaintiff.]

WILLIAM WILLOUGHBY, a witness called on behalf of the plaintiff, after being duly sworn, testified as follows:

Direct Examination.

(By Mr. WHEELER.)

The WITNESS.—My name is William Willoughby and follow the business of mining, and am employed at the Pennsylvania Mine.

On the morning of the 5th day of November, 1912, at about the hour of 4:00 o'clock I witnessed an accident that took place on the South Montana street crossing below the old reduction works. I saw the wreck of a milk-wagon by an engine. This was about 4:00 o'clock, or ten minutes after 4 in the morning. I just forget the number of the house at which I was living at that time, but it was in the two thousand block on South Montana street, and I was just coming off shift at the time I saw this accident. I first saw the team south of the electric light plant on South Montana street about a hundred feet south of the Milwaukee crossing, and saw the train coming down the track at that time, and saw a gentleman, a brakie, on the rear end of the train. The engine was attached to the west end of the train, backing up, the train going westerly. I observed gates at the crossing, but they were not down. Also observed an arc light near the crossing, up over the crossing, within ten or fifteen feet of it. My attention [34] was first called to the train when I was up at about George Berg's cabin.

(Testimony of William Willoughby.)

I saw the man that was on the rear end of the train on that morning jump off the end of the train and stop. Approximately this was about thirty-five or forty feet from the crossing, not over forty feet. At the time this man jumped, the team was approaching the track, or crossing, maybe within ten or twenty feet. There were no headlights on the rear end of the engine. There was a lamp there, but it was not lit. As the train was coming the track the engine was forward on the train and going in a westerly direction. The train was backing and drawing twelve cars.

Q. What, if anything, happened to the wagon after it was struck by the engine?

A. Oh, it looked to me similar to a "cordian"; it was all smashed.

The wagon was pushed in front of the train, or in front of the engine, directly on the track, in front of the step on the engine. The wagon went ahead on the track possibly two hundred feet, just like a sled, as near as I can tell. I don't know whether that is the exact distance, but it is a rough estimate.

With reference to whether or not there was any bell rung on that engine that morning, there was no bell rung; there was a whistle blown up at the switch that turns into the Hazelton Monument Works, which was, approximately, between [35] seven and eight hundred feet from the crossing, around there somewhere. With reference whether or not the engine was making any noise coming down that track, it was pretty well downgrade there, and they chiefly run

(Testimony of William Willoughby.)

down on brakes. I didn't hear any noise at all, only heard the whistle blow at the switch.

This man who jumped off the engine when it was approaching the crossing I saw give a signal, of course, to the engineer. I was standing on the north side of the track, or crossing, on Montana Street, possibly seventy-five yards from the railroad. The engine struck the wagon right in the body of the wagon and the horses were pitched, turned and twisted in every shape, for possible one hundred feet.

Of course, I don't know, or didn't know at that time, the name of the boy that was in the wagon, but I saw the boy this morning of the accident that was in the wagon. After the accident took place I went down to see if the boy was in the wagon or not, but I couldn't find him there.

I made an examination of the engine with reference to a light, and I found the light was damaged by the wagon, and there was no light on, of course. I found the boy, with reference to the crossing, about seventy-five or may be a hundred feet west of Montana Street between the cars, or between the tracks under the cars.

Q. Did you examine the track for the purpose of ascertaining whether or not there was any blood, or anything else on the track? [36]

Mr. FURMAN.—I object to this question as leading, and also suggestive.

Mr. WHEELER.—This is for the purpose of fixing the place, as near as he can, where the body first

(Testimony of William Willoughby.)

struck the track.

Objection overruled.

To which ruling of the court counsel for defendants then and there took and was allowed an exception.

Q. Go ahead now and state,—where would you say that was with reference to being west of the crossing? A. Where the body laid?

Q. Yes, where the body laid.

A. Around seventy-five feet, may be more.

Q. Well, I am asking you where the point was that you first found any blood on the rail, or on the tracks?

A. Probably half ways from where the body was lying to Montana Street.

Cross-examination.

(By Mr. FURMAN.)

The WITNESS.—I stayed around the place where this accident happened until the train was about to leave there. I don't believe that I stayed until it did leave, I believe it left, possible, when I was up—well, I think I had left before the train pulled out. I did not examine the track at all after the train left. The examination I made was [37] while the train was standing on the track; I had a candle in my pocket and I just took that and lit it and looked along on the south side of the track and there is where the boy lay. You could notice him very plainly. I said that it was on the south side of the track, and I looked in between the rails also. This was while the train was standing on the track, and

(Testimony of William Willoughby.)

just before the undertaker came. I didn't crawl under the cars, I just went down on my knees and investigated. At that time I had no idea that I would be called as a witness in this lawsuit and that was not the reason why I made this investigation.

I am not familiar with switch-engines, though I have seen lots of them. I don't know whether switch-engines are built so they are practically alike on both ends. I know a switch-engine is lighter. This was a switch-engine. It was an engine that they were doing their daily work with. These engines are usually all alike.

Q. Do you know whether it would make any difference whether that switch-engine was running forward or backward? A. Not as far as I know.

I don't think it would make any difference, so far as its motive power is concerned. When this accident happened I was about seventy-five yards north of the track. After the accident happened and the train was stopped I went to the west end, or over toward the west end of the train to see whether the boy was in the wagon or not, and I couldn't [38] find him there, and I went to the south side of the track and I discovered him between the tracks. This man that I said I thought was a brakie that got off the rear end of the train was riding on the rear steps of this engine. By the rear steps I mean the west end of the engine. The engine was going west. I was on the north side of the crossing, and when he got off he got off on the north side of the train. I didn't know at that time who the man was, I couldn't

(Testimony of William Willoughby.)

tell you just exactly his name, I think they called him Chapell. I certainly could recognize him if I saw him, I was pretty close to the man.

Q. Is that the gentleman back there (counsel requesting Mr. Chappell to stand up)?

A. Yes, that is the gentleman.

I saw him get off at the north side of the track. I didn't know who he was before I got up to the track, but this is the man I saw get off on the same side of the track that I was on. When the boy, or the wagon, was struck it was right square on the track. I saw him coming from the opposite side of the track from where I was, about a hundred feet away, coming toward the arc light. That was when I first saw him. I was about a hundred yards north of the track at the time I saw him approaching.

Q. What called your attention to him when you first noticed him?

A. Well, simply because I saw him approaching this arclight, [39] I didn't know what was coming up, I thought it was rather hurried for a milk-wagon. He was just coming along on a slow trot. I didn't notice whether or not there was any effort made on the part of the driver to stop the team; I didn't notice him, or that there was anything wrong until he was on the track and the engine struck him. I noticed the engine coming, and I noticed the lad get off the train, then I afterwards noticed the wagon when it was struck.

Q. What was it directed your attention to the train first?

(Testimony of William Willoughby.)

A. The brakeman got off the engine and then I noticed the wagon.

Q. You didn't notice the wagon until you noticed the train?

A. I noticed the brakeman get off and make his flash to the engineer, then I noticed the wagon on the track.

I noticed the train prior to that time, I saw it coming down the turn, but I didn't know there was any such an accident going to occur. What first directed my attention to the train was, I heard the whistle blow down at that switch, then I saw it approaching the crossing east of Montana Street.

When I saw this man jump off the engine with a light, the head end of the train was possibly forty or forty-five feet, may be fifty feet, from the wagon. The arclight was burning that morning, and also on the east side on the other crossing. There was no headlight on the tail end of that switch-engine that morning, [40] but the lamp was there. When I went down to see the wreck the lamp was there. I can't tell you, correctly, how many cars were on that train that morning, but I would judge, possibly, from ten to twelve. I never noticed whether or not they were loaded; they were chiefly box-cars, I know that. I would know the man that I saw get off the tail end of that engine. I saw him signal to the engineer, I supposed that was what he did; of course, I didn't know what that was, but I thought it was something for quick action, the way he gave it. As to the way in which he gave it, I couldn't tell you

(Testimony of William Willoughby.)

any more than I saw him throw his lamp. That was all on the side of train I was on. I saw somebody in the cab of the engine; there was one or two men, I wouldn't be positive about that—I know I saw one or two men there. I saw at least one, but later when I got to the wreck, I saw these fellows around, of course, I didn't pay any great attention to them.

Q. Now, you stated on your direct examination that the train was coming downgrade noiselessly?

A. I didn't hear a sound of the train—oh, you might hear a little rumbling, but not anything to draw your attention.

Q. You didn't hear the stop-cocks on the locomotive?

A. I am not any locomotive engineer, and I don't know as to that.

I have been around switch-engines and have seen and heard escaping steam and heard the escaping steam when [41] it made a loud noise, and I have seen switch-engines on the track when they made loud noises. I didn't hear any such noise as that on this morning. Neither did I hear any bell ringing at all, not in my presence. I was not over seventy-five yards from the crossing at the time the train crossed it. I saw the boy beneath the train. I didn't help pick the boy up, but I would have assisted if the undertaker hadn't had an assistant with him. I think the name of the undertaker was Warren Richards, and he had an assistant along with him. I didn't examine very closely the head end of the locomotive to see what damage had been done to

(Testimony of William Willoughby.)

it. I stated, I believe, that the light had been injured by the accident. I think the lamp was injured, I noticed the glass was broken. This was on the west end of the engine.

Redirect Examination.

Mr. WHEELER.—Q. When you speak of glass being broken, do you mean the glass in the wagon, or the glass lamp in the engine?

A. Well, there was not much glass left in the wagon.

Q. Did you notice a light in the engine—whether or not there was a light on the engine as it came down around that curve?

A. On the west end of the engine there was no light, just a brakie. [42]

Q. By that you mean what?

A. The brakeman had a lamp in his hand.

He had a lantern in his hand that he gave the signal with. The brakeman was riding on the front step of the engine, or the step on the hind end of the engine, on the north side.

Recross-examination.

(By Mr. FURMAN.)

It was pretty dark at that time in the morning—it was fairly light for a fall morning, it was real dark.

Q. Did you see any effort made by the driver of the wagon to check his team before the accident happened?

A. The only time I saw it was about a hundred

(Testimony of William Willoughby.)

feet south of the track, and I never noticed the wagon any more until it was right on the track, and I don't know whether he made an effort then, or before that, or not, I don't know.

Witness excused. [43]

[Testimony of James B. Glover, for Plaintiff.]

JAMES B. GLOVER, a witness called on behalf of the plaintiff, after being duly sworn, testified as follows:

Direct Examination.

(By Mr. WHEELER.)

The WITNESS.—My occupation at the present time is that of time-keeper at the Anaconda mine.

Q. How long have you been employed as such time-keeper?

Mr. FURMAN.—This is objected to as incompetent, irrelevant and immaterial.

Objection overruled.

To which ruling of the Court counsel for the defendant then and there took and was allowed an exception.

A. About two months.

I was acquainted with David Clement Jr., in his lifetime, and had some business with him. He was working for me on or about November, 1912. He worked for me for a period of about six months—I won't say positively, that is just a guess. He was a boy that I always thought was older than he really was; I understand that he was about sixteen years of age, but I thought he was a boy of about seventeen or eighteen years of age. He was a boy of good

(Testimony of James B. Glover.)

habits, extremely good. He was also a competent boy, a boy that I always could depend upon—that was why I [44] thought he was older than he was.

Q. What have you to say with reference to whether or not he was a strong, healthy boy?

Mr. FURMAN.—I object to this as incompetent and immaterial, and as also calling for the conclusion of the witness.

The COURT.—He may answer. The objection is overruled.

To which ruling of the Court the defendant then and there took and was allowed an exception.

A. Was a good strong boy.

Q. Do you know what common laborers got in this community, when they worked on the service?

Mr. FURMAN.—We object to this as incompetent irrelevant and immaterial. He can testify what this boy was actually getting, but what other laborers got.

Objection overruled.

To which ruling of the Court counsel for defendants then and there took and was allowed an exception.

A. Well, laborers received from \$3.00 to four dollars per day.

They received from three to four dollars a day for surface work and three dollars and a half per day for miners.

Q. What kind of milk-wagon was it that David Clement drove for you?

Mr. FURMAN.—This is objected to as incompetent, irrelevant and immaterial, and does not prove or

(Testimony of James B. Glover.)

tend to prove any of the issues in this case raised by the pleadings. [45]

Objection overruled.

To which ruling of the Court counsel for defendants then and there took and was allowed an exception.

A. This wagon we had had seen about three months service; it was inclosed, it had glass panes in the doors—I couldn't really describe it, the front end of it was glass, but where the driver sits, in order to see on he would have to lean ahead and see through these glass doors. In one of these glass wagons the seat is back of the door.

These were sliding doors that slid toward the rear of the wagon. I noticed the wagon after it was struck.

Q. What have you to say as to the condition of the wagon after it was struck?

Mr. FURMAN.—This is objected to as incompetent, irrelevant and immaterial and does not tend to prove or disprove any of the issues raised by the pleadings.

The COURT.—It may be competent to show the speed the wagon was going, and there are other reasons that possibly would make it competent under the pleadings. The objection will be overruled.

To which ruling of the Court counsel for defendants then and there took and was allowed an exception.

A. The wagon was pretty demolished, I don't believe there was but a very small per cent of it that could be used again. [46] It was about as well

(Testimony of James B. Glover.)

smashed up as any wagon you ever saw. There was a pretty good load of milk on it.

Q. Empty or full cans of milk?

Mr. FURMAN.—We object to this as incompetent, irrelevant and immaterial. Objection overruled.

To which ruling of the Court counsel for defendants then and there took and was allowed an exception.

A. Full cans of milk, and cream bottles.

Q. Do you know whether or not any of the milk was delivered on this particular morning before the accident took place?

Mr. FURMAN.—This is objected to as incompetent, irrelevant and immaterial, under the pleadings in this case.

Objection overruled.

To which ruling of the Court counsel for defendants then and there took and was allowed an exception.

A. I know of one customer, that is all; he had six customers to deliver to, but he had six customers and I went to four of the customers and found out where they got their milk.

Q. Where were they with reference—where were these customers with reference to this railroad crossing—the last customer?

Mr. FURMAN.—This is objected to as incompetent, irrelevant and [47] immaterial.

Objection overruled.

To which ruling of the Court counsel for defendants then and there took and was allowed an exception.

(Testimony of James B. Glover.)

A. He delivered before going across the track, I think to four houses, before he crossed this crossing.

Cross-examination.

(By Mr. FURMAN.)

The WITNESS.—Of my own knowledge, I don't know whether David Clement, Jr., delivered milk on that morning or not, any more than from what they told me.

I became acquainted with David Clement out at the ranch. I think some of the boys introduced him to me, brought him out there one day. I cannot recollect at this time who it was brought him out. I do not know anything where David Clement lived at the time I first met him. I have no knowledge of what he was doing at the time I first met him. I didn't know anything about him at the time he came out to the ranch and was introduced to me, of my own knowledge.

Q. Do you know when you first heard of this boy, David Clement, Jr.?

Mr. WHEELER.—I object to this as incompetent, irrelevant and immaterial, and as not proper cross-examination.

Objection sustained. [48]

To which ruling of the Court counsel for defendants then and there took and was allowed an exception.

Positively, I don't know for a fact how much I was paying David Clement, Jr., per month during the time he worked for me. He had different salaries. I think he started in at twenty dollars per month.

(Testimony of James B. Glover.)

Q. Did he have anything coming at the time of his death?

Mr. WHEELER.—This is objected to as incompetent, irrelevant and immaterial and as not proper cross-examination.

Objection sustained.

To which ruling of the court counsel for defendants then and there took and was allowed an exception.

During the time I ran the dairy I paid some laborers from three to four dollars a day. I paid one man that. That was one of the drivers. At that time I do not really remember how many common laborers I had employed at the dairy, but I think I can give it to you approximately. I think I had four boys and three men.

David Clement had driven this particular wagon for me prior to the morning of the accident. He used to bring the wagon to me into town. I used to meet him. With reference to where I would meet him would depend. If he was a little late I would go down the road to meet him toward the ranch, but if he was on time he would come to the house for me. I lived at 1020 Nevada, between First and [49] Second on Nevada, which is north of this crossing where the accident occurred; to get to my house it was necessary for him to come over the Montana Street crossing. I can't say whether the boy delivered this wagon to me during the entire six months he worked for me or not, but when I found he was competent, that he would drive the wagon he almost

(Testimony of James B. Glover.)

invariably brought the team in for approximately two months.

Q. That is for sixty days?

A. Yes, fifty or sixty days.

Roughly speaking, during the course of six months he crossed this Montana street crossing fifty or sixty times with this particular wagon. Easily that many times.

With reference to what time in the morning he would usually cross this crossing, I will say that on this morning he was pretty early; he was late the morning before, and I kind of jacked him up a little that morning, and he kind of took it to heart and he came in a little before I expected him, but, generally speaking, he crossed this crossing at fairly a uniform hour, about five o'clock or half-past five o'clock.

Redirect Examination.

(By Mr. WHEELER.)

The WITNESS.—I made some measurements down there at the crossing. There are some houses on Montana Street south of this crossing. I made a measurement of the distance from the crossing to the first house south. [50] Referring to this map, Plaintiff's Exhibit "A," I made measurement of the distance between the first dwelling-house on the south side of the track to the Chicago, Milwaukee track. That dwelling is on the east side of the street. The distance from that track to a point right opposite the corner of the dwelling was about seventy-six feet. There are other houses farther south of this dwelling.

I found the wagon that morning at a point two

(Testimony of James B. Glover.)

hundred and fifty-five feet from the middle of the road, approximately, it may have been two hundred fifty-seven feet, but over two hundred and fifty feet. I spent probably thirty minutes where I found that wagon that morning.

I made some measurements with reference to switches.

Q. Did you make any measurements with reference to any switches, with reference to the point of contact of the engine with the wagon, that is of any switches and tracks down there west of the track and west of the crossing?

Mr. FURMAN.—I object to any testimony with reference to that switch, or any other switch, as incompetent, irrelevant and immaterial, and does not prove or tend to prove any of the issues raised by the pleadings.

Mr. WHEELER.—I intend to connect this up, if your Honor please.

Objection overruled.

To which ruling of the Court counsel for defendants [51] then and there took and was allowed an exception.

A. I made some measurements from this point. We will call the middle of the road here (indicating), "A," and call this point directly opposite from the house in the middle of the road "B," and we will call the point on a line east of the dwelling and opposite "B," we will call that "E," on the railroad track, and we will call the switch "D"; just west of "A" is the center of the crossing. At the point "E" will be

(Testimony of James B. Glover.)

where the wagon was taken from the switch-engine, supposed to have been. I do not know what the distance from the crossing, or the point marked "A," the point of contact, to this track here (indicating). I didn't measure it. I measured the distance from that point to the switch, marked "D," which was two hundred forty-two feet. I measured the distance from the point of contact, "A," to the point "E" which I have marked directly opposite point "B," which is, I think, three hundred forty-seven feet. The distance from the point directly east of the dwelling-house nearest to the crossing of the railroad track and where the engineer could see this crossing is three hundred and forty-seven feet.

I am familiar with the road down there leading up to the crossing from the south side of the track. The condition of the road at the time of the accident was bad, it was torn up. [52]

Q. For what distance was Montana Street torn up south of the crossing?

Mr. FURMAN.—I object to this as incompetent, irrelevant and immaterial.

Objection overruled.

To which ruling of the Court counsel for defendants then and there took and was allowed an exception.

A. It was torn up over a distance of probably two hundred feet from the track to a point about ten hundred feet west of Montana Street going toward the ranch, that is south, on the side of the cemetery.

The street-car company had excavated in order to

(Testimony of James B. Glover.)

lay their tracks, and they were having trouble, as I understand it, going toward the track, and that road was torn up for two or three months—it was torn up and it was almost impassable. There was a place where they had left a little opening for you to drive down through the excavation, but up on the other side, on the east side by the cemetery, it was straight and we could drive down the road. I didn't make any measurements of the width of Montana Street at the crossing, and do not know what width it is.

Recross-examination.

(By Mr. FURMAN.)

The WITNESS.—This point where I testified that we drove [53] down through this excavation is a point far south of this crossing, I should judge a quarter of a mile.

Q. How about the road immediately to the south of the crossing here (indicating) between the crossing and this house; what is the condition of the road along there?

A. Well, from the crossing to the point "B" was all right, but from "B" is where the excavation starts.

At point "B" is the nearest place where I said you could see the railroad track and the point I have got marked "E" is the farthest point east on the railroad track that you could see, that is the point where the engineer could have seen the boy after he had just come around the corner of the house. At that point the engineer would be three hundred forty-seven feet from the crossing, and the boy would be

(Testimony of James B. Glover.)

a hundred seventy-five feet, or a hundred seventy-six feet, approximately, from the crossing; in other words, just about half as far as the engineer would be from the crossing. From the point where the wagon was taken from the switch-engine to the crossing was about two hundred fifty-five feet, approximately. This switch was two hundred forty-two feet distant from the crossing.

This customer that I spoke of as having received his milk on this morning lives in the house right next to the monument works. That house is not shown here on this map. I did not measure to see how many feet that would be from the crossing. I would not like to make an estimate [54] of about how far it would be, I might be away off, I can't say, it was within, to be sure, six hundred feet, or possibly shorter than that; I feel positive it was a shorter distance than that.

Witness excused.

[Testimony of M. I. Chappel, for Plaintiff.]

M. I. CHAPPEL, a witness called on behalf of the plaintiff, after being duly sworn, testified as follows:

Direct Examination.

(By Mr. WHEELER.)

The WITNESS.—My name is M. I. Chappel and at the present time I am engaged in writing insurance, for an old line company. My occupation on or about November 5, 1912, was that of engine foreman in the charge of the Chicago, Milwaukee and St. Paul Railway Company. I am a codefendant

(Testimony of M. I. Chappel.)

in this case, I believe. On the fifth day of November, 1912, I was in charge of the yard crew for the Chicago, Milwaukee and St. Paul Railway Company, in Butte. My duties were, the direction and movement of the switch-engine and crew, the switch-engine being number [55] 1163, and if I remember right the class of the engine was a "Y-5," which is an ordinary switch-engine. The tank on that engine is what is called a sloping tank and what is, as a rule, used on a properly equipped switch-engine.

At the time this accident took place, there were twelve loaded cars on this engine, loaded with coal and coke. With reference to whether or not there was any air connected with the various cars on that train on this morning, the air-brakes were all connected from the engine to the last car, including the last car. The engine and train were going in a westerly direction, the engine was backing up, the engine being on the west end of the twelve cars, going in a westerly direction. The engine, or train on this particular morning was going at a rate of speed of probably eight or nine miles per hour around that curve. The whistle of the engine was blowing about seven hundred feet east of the Montana Street crossing. The Milwaukee track just previous to its reaching the Montana Street crossing crosses Placer Street, and I know there is a crossing at that point. I am not familiar with Greenwood Avenue and don't know whether that is the name of the street or avenue the track crosses besides Placer Street or not.

(Testimony of M. I. Chappel.)

Q. Calling your attention, now, to this map, Plaintiff's Exhibit "A," I will ask you if it is not a fact that you would have to, before reaching the Montant Street crossing [56] cross this alley here (indicating)?

A. I don't remember as to that alley.

The whistle blew, I say, about seven hundred feet away from the Montana Street crossing. That would be east of the Placer Street crossing. It would be east of the Greenwood Avenue crossing, according to what you say is the name of this street. As to whether the bell was rung on this morning, there might have been a tap of the bell about the time the whistle was blown.

I was riding on that morning, with reference to the engine, on the south side of the footboard on the extreme west end.

Q. I will ask you to state whether or not you were in a position so you could have heard the bell ring, if it was ringing.

Mr. FURMAN.—I object to this as calling for the conclusion of the witness, and as incompetent, irrelevant and immaterial.

Objection overruled.

To which ruling of the Court counsel for defendants then and there took and was allowed an exception.

A. I believe I could have heard it had it been continuously ringing.

Q. I will ask you if it is not a fact that the only time that bell rang, if at all, was at the time the

(Testimony of M. I. Chappel.)

whistle was blowing. [57]

Mr. FURMAN.—This is objected to as incompetent, irrevelant and immaterial, and as asking for mere conclusions of the witness.

Objection overruled.

To which ruling of the Court counsel for defendants then and there took and was allowed an exception.

A. To my knowledge.

Q. And that was about seven hundred feet east of the crossing? A. Yes, sir.

On this particular morning when we crossed the Montana Street crossing, the train was going at about eight miles an hour. I saw the milk-wakon in question on this particular morning about three hundred and thirty or three hundred forty feet from the Montana Street crossing, that is when I first observed it. When I first observed the milk-wagon I should judge it was about one hundred forty, forty-five feet south of the railroad crossing of Montana Street. The team and wagon was going at a rate of speed of about four or five miles per hour. I was watching the wagon up to a point about a hundred and fifty, or maybe two hundred feet from the crossing and I gave the engineer what is known as, the slow signal. The purpose of giving that signal was for the engineer to get his train under control and prepare to make a stop. That signal was given a hundred and fifty or two hundred [58] feet from the crossing. On that particular morning I gave another signal to the engi-

(Testimony of M. I. Chappel.)

neer when the engine was about seventy-five feet, between seventy-five and a hundred feet from the Montana Street crossing. That signal was a positive sign to stop. As I say, when I gave that positive sign to stop the engine was between seventy-five and a hundred feet from the crossing, at which time this boy was about twenty feet from the crossing.

I am familiar with the rules of the company. I said that I was foreman of this crew, or you might say conductor. I was the foreman of the crew. The two positions, foreman and conductor, are relatively the same. I was familiar with the duties of a conductor with reference to the management of a train. The conductor, or foreman, has absolute control of all employees connected with a train. Relative to the rules of the company with reference to the engineer taking his signal from the conductor, it is his duty to take them from him, and obey all signals and act accordingly. And there was no answer made to my signals by the engineer of this particular morning that I could tell. When we got near to the crossing I got off the train, jumped off or stepped off about thirty feet east of the crossing. That was after I had given the signal to the engineer to stop. At the time I jumped off the engine this team of horses' heads were just coming on the crossing, over the rail, the south rail. At the time [59] I jumped the engine it was going at a rate of speed of about six miles per hour, between five and six miles per hour, and I ran along with the engine until the engine struck the wagon.

(Testimony of M. I. Chappel.)

Q. What, if anything, did you do when you jumped from the engine with reference to giving any signals?

A. I don't know how many signals I did give. I don't know how many signals I gave after I was on the ground but I ran along with the rear of the engine until the engine struck the wagon, to see if there was a possible chance for him to get by.

The engineer's position in the cab of that engine was on the south side of the cab, the same side of the engine I was on, and the same side that the wagon was coming from. I gave a wash-out signal, that is an action of the lamp, that was at the time I dropped off, or just prior to the time I stepped off the footboard that I gave that wash-out signal. That was just prior to the time I stepped off the footboard that I gave what is termed a wash-out signal, that is, to stop immediately. The engine struck the wagon on the tracks to the east of the center of the crossing.

There was also a street-car track on Montana Street, that went across this railroad crossing. There were gates at this crossing, which were up at the time, unfortunately.

Q. Was there any flagman at the crossing? [60]

Mr. FURMAN.—We object to this question as incompetent, irrelevant and immaterial, no damage being predicated upon, or based upon, the failure to maintain lights, or to maintain a flagman at this crossing.

The COURT.—The objection is overruled. It

(Testimony of M. I. Chappel.)

might make a difference in the degree of care, or diligence, on the part of the engineer to exercise. If there was a flagman there, the engineer might rely, to some extent, on him, but if there was none there, and he knew it, it might require more diligence on his part.

To which ruling of the Court counsel for defendants then and there took and was allowed an exception.

A. There was not.

This accident took place about four A. M. After the engine struck the wagon it dragged it four car-lengths and an engine length, the car-lengths are from thirty-six to forty feet, and the engine is between fifty and sixty feet, approximately, I don't know exactly.

Q. What, if anything, did you do after the engine stopped?

A. When the engine stopped I immediately, or possibly a little before it stopped, I got off the side like of the car, I went over across the draw-heads to the north side of the track—I am not positive whether it came to a full stop at that time or not.

[61]

I saw the boy after the accident. He was in pretty bad condition. I found him between the rails about underneath the draw-heads, a little bit closer to the north rail between the second and third car ahead of the engine.

Q. What have you to say with reference to whether or not he was living or dead?

(Testimony of M. I. Chappel.)

A. Well, I considered he was beyond all human aid at that time.

Q. Did you notice any movements—I will ask you if it is not a fact that—

The COURT.—Do not lead this witness too much. This witness is able to answer without leading him.

Q. What did you notice with reference to any movements of any part of the body?

Mr. FURMAN.—We object to this as leading and suggestive.

Objection overruled.

To which ruling of the Court counsel for defendants then and there took and was allowed an exception.

A. Merely gasping a little, frothing at the mouth, as if in his last struggles for life; I considered him to be beyond all human aid at the time.

He was between the rails of the track at the time. His body was about three car-lengths and one-half, just [62] the exact distance I don't know from the center of the crossing of Montana Street.

Q. State whether or not you noticed any blood or anything else upon the rails of the track prior to the time you saw the body east of a point where you found the body.

Mr. FURMAN.—This is objected to as leading and also suggestive.

Objection overruled.

To which ruling of the Court counsel for defendants asked for and allowed an exception.

A. I don't quite understand your question.

(Testimony of M. I. Chappel.)

Q. Well, was there anything found by you with reference to parts of the body east of the place where you found the body itself, the main portion of the body?

A. Before making my first examination of the body you mean?

Q. At any time?

A. I saw that afterward, yes.

Q. What did you find there?

A. His hand was picked up about, I should judge, ten feet east of the body, picked up by the assistant undertaker, I was with him at the time.

There was nothing else that I could call to mind that was found there.

Q. Was there any blood or anything of that kind?

Mr. FURMAN.—I object to this as leading and suggestive. [63]

Objection overruled.

To which ruling of the Court counsel for defendants asked for and was allowed an exception.

Q. About how far east of the body was it that you found the blood?

Mr. FURMAN.—I object to this as leading and also a repetition.

Objection overruled.

To which ruling of the Court counsel for defendants asked for and was allowed an exception.

A. If I remember rightly it was between where the hand was picked up and the location of the body.

Where I first saw any of these remains of the body, or signs, was about a hundred and forty-five

(Testimony of M. I. Chappel.)

feet east of the crossing.

Q. At what rate of speed would you say the horses and wagon were moving?

A. About four or five miles per hour probably, the team was jogging, a little jog or trot.

With reference to the condition of the lines on the horses when I saw them, that is when they got into a place where I could see them, the lines were slack. I have seen this paper, the rules of the company, which you now show me, before. Those are the Chicago, Milwaukee and Puget Sound Railway Company's rules. That paper contains the rules of that company and were in effect at the time this [64] accident took place. There is a rule of the company with reference to giving signals before reaching crossings. The rule is that the bell must be rung in approaching all crossings at grade.

Q. What have you to say as to whether or not it should be rung continuously?

Mr. FURMAN.—This is objected to as leading and suggestive.

Objection overruled.

To which ruling of the court counsel for defendants asked for and was allowed an exception.

A. The rules call for the bell to be rung upon approaching all crossings at grade, and continuously rung until the crossing is passed.

Q. I will ask you what tonnage was upon that train that night, if you know?

A. Approximately 700 tons, sixty tons per car.

Q. What was the tonnage of the engine?

(Testimony of M. I. Chappel.)

A. About sixty-five tons, between a hundred forty-five and a hundred and thirty thousand pounds.

Q. What were the requirements of the company with reference to the crews on trains?

Mr. FURMTN.—I object to this as incompetent, and as not being the best evidence.

Objection overruled. [65]

To which ruling of the Court counsel for defendants asked for and was allowed an exception.

A. A crew consists of a conductor, two brakemen, engine foreman, and two helpers.

Mr. WHEELER.—We offer in evidence Plaintiff's Exhibit "B," and particularly rule No. 94.

Mr. FURMAN.—This is objected to for the reason that it does not appear that the rule was applicable to trains of the class of that train on the morning in question.

Objection overruled.

To which ruling of the Court counsel for defendants asked for and was allowed an exception.

Rule No. 94 read in evidence as follows:

"The whistle shall be sounded in accordance with the rules, one-half mile from stations, railway crossings, drawbridges and junctions, also eighty rods from highway crossings; the bell shall be rung and kept ringing until the crossing is passed."

This was about four o'clock in the morning that this happened. It was not what you would call dark, and it was not light. There was an arclight almost directly over the crossing.

Q. For what distance would you say the rays of the

(Testimony of M. I. Chappel.)

arclight were thrown?

Mr. FURMAN.—This is objected to as calling for the conclusion [66] of the witness. The witness is not qualified to give expert testimony.

Objection overruled.

To which ruling of the Court counsel for defendants asked for and was allowed an exception.

A. Probably throw a light for a hundred feet, a reflection.

Q. What have you to say as to whether or not you have seen people passing along that street?

Mr. FURMAN.—I object to this for the reason that it is incompetent, irrelevant and immaterial.

The COURT.—I think it can be assumed that people pass along the street.

Q. I mean at this particular time in the morning, have you seen men pass over these tracks?

The COURT.—I think the question is proper. The objection will be overruled.

To which ruling of the Court counsel for defendants asked for and was allowed an exception.

A. I have seen people passing there at all hours, pedestrians, vehicles passing at all hours of the night over this particular crossing.

This tender that was on the rear end of this engine on this morning was what I know as a sloping tender, it can be termed a fan-tail tender. I have ridden on that engine myself.

Q. How close to the engine could you see an object when [67] you are sitting in the cab of the engine and looking back—how close you could see an object

(Testimony of M. I. Chappel.)
to the rear end of the engine?

Mr. FURMAN.—I object to this as calling for a conclusion on the part of the witness, and as incompetent and immaterial, and for the reason that the witness is not qualified to give expert testimony on this matter.

Objection overruled.

To which ruling of the Court counsel for defendants asked for and was allowed an exception.

A. By having your head at the window you could see it any time, you could see directly to the wheels of the tender along the rail on this side.

Cross-examination.

(By Mr. FURMAN.)

The WITNESS.—Describing the shape of this water-tank a little more fully, the tank was on the west end of the engine and the engine was backing up, going west. The slope on this tender begins just back of the coal pit, which is located right next to the cab. This coal pit is probably three feet across by four feet and a half long, and immediately behind that the tender begins to slope. As to how high the top of the tender is from the rail of the track, I don't know, but I should judge that it is about four feet high; I don't think it is any higher than that, possibly not as high. [68]

On this morning I was standing on the extreme southwest corner of the footboard.

Q. I will ask you if one of the stop-cocks were open on the engine as it came around that curve?

(Testimony of M. I. Chappel.)

A. It was not; if it had been we would not have been going.

I don't think that there was any exhaust of steam at all from the engine.

I am not working for the Milwaukee Railroad Company at this time. I didn't quit their employment. What happened was they took me out of service and they have never returned me. I am not discharged, although I am not in their service.

There was practically seven hundred and twenty tons weight on that train on this morning, it may have been less, but I don't think it was any more. There was an air-brake connection made along that train from the engine, the engine included, and they were connected up. The speed as we came around that curve, three hundred and thirty feet, or thereabouts, from the crossing was eight or nine miles per hour. At the time I got off the engine at a point east of the crossing, the speed was five or six miles an hour. When I got off the engine I was about thirty feet from the crossing, at the outside limit.

Q. I will ask you if you did not make a statement over [69] your own signature in making a report of this accident to this effect: "I did not give him a stop signal until I saw we could not avoid hitting the wagon and jumped right after giving signal."

Mr. WHEELER.—I object to this as improper cross-examination. It is improper if it is for the purpose of impeachment. There has been no grounds laid for impeachment as yet.

The COURT.—I think so; he is not asked for his

(Testimony of M. I. Chappel.)

opinion whether or not the engineer could have stopped the train if he gave him the signal. I do not think the proper foundation for impeachment has been laid. The objection will be sustained.

To which ruling of the Court counsel for defendants asked for and was allowed an exception.

I can't say that I am familiar with all the street crossings down there. With reference to whether or not I am familiar with the crossings that have been established there at the time I was working there, I will say that I am familiar with the Montana Street crossing and also the Placer Street crossing. I have been crossing the Montana Street crossing at the place where this accident happened for some time, and have been crossing there since the twentieth of June, if I remember. I have been working there from the twentieth of June until this day in question and had frequently been over this strip of track, [70] having gone over it several times each shift. There was a crossing at Placer Street also. I recollect this Greenwood alley, or I know there is a street there, I saw a street but I don't know what the name of it is.

I never heard the bell ring after the whistle was sounded until the accident happened. I didn't hear the bell. I know of no noise emanating from the engine, escaping steam or anything of that kind at that particular point, nothing that I call to mind at the present time. I immediately prior to the time that I stepped off the engine, I was standing on the south corner of the footboard. The footboard runs the full

(Testimony of M. I. Chappel.)

length of the engine, or the tender, and under the draw-head from one end of the tender to the other just in front of the wheel. It runs across the end of the tender, this particular footboard, I was standing on that.

It is usually the duty of the fireman to ring the bell; the bell cord is on his side, but sometimes they have it connected so that either of them can ring the bell, but I believe it is the foreman's to take care of the bell, and it is the engineer's duty to see that he attends to his duty.

I am familiar with engine No. 1163. The bell cord was on the left side of that engine, which is the foreman's side, but I don't remember if the bell cord was connected all the way across so the engineer could reach it or not. [71] The name of the fireman on that morning is Joe Barish, or a name very similar to that. I do not know where he is now.

When I first saw the wagon approaching from the south I was about three hundred thirty or three hundred forty feet from the crossing, and we were going at a rate of speed of between seven and nine miles per hour. The wagon at that time was about a hundred and forty-five feet from the crossing, and was going at a rate of speed of probably four or five miles per hour. I watched, continuously, the approach of the wagon and team from the time I first saw it. There was no effort made on the part of the driver of the team to check or stop it from the time I saw it. I observed the character of the team that was drawing the wagon, and I saw no evidence of fright of the

(Testimony of M. I. Chappel.)

team whatever. Just before the engine struck the wagon, one horse did throw his head up like he had just started to sheer a little bit. That was the first I noticed the horse do anything at all. Up until that time there was no evidence of alarm on the part of the team that I noticed. Up until that time the approach of the team was fairly uniform all the time. I saw no sign of any driver at all. I saw no indication that there was any driver in the wagon. I could see the character of the vehicle itself when it got into the rays of the street lights. The vehicle, or wagon, was about forty or fifty feet from the crossing, [72] possibly more, when it came into the rays of the street lights so you could distinguish and ascertain the character of the vehicle. At that time you could see the lines over the horses' backs. The lines were slack, and there was no evidence of the driver. It was a covered vehicle with glass in front and on the sides. The point at which I gave the first signal to stop to the engineer was about between a hundred and fifty and two hundred feet from the crossing. The place where I stood on this engine was on the same side of the engine that the engineer was on, or supposed to have been on. The first signal I gave him was a slow-down sign. That signal was made by holding the right hand up in such a position as this (indicating). The next signal I gave was stop signal, and gave that signal when we were some seventy-five to a hundred feet away from the crossing. With reference to how long it was that I gave the first signal until I gave the second signal I can only say that in

(Testimony of M. I. Chappel.)

my judgment the engine traveled about a hundred twenty-five feet, I can't tell the exact time it took. I do not care to estimate the time. It would be hard for me to estimate or approximate the time, and I don't care to do it.

Q. Mr. Chapell, will you kindly make an estimate of the time that elapsed after you gave the first signal until you gave the second signal? [73]

A. I don't care to do it, it would be a conclusion and I couldn't estimate with accuracy.

I would not want to give you an estimate of the exact time it was. If I said that it was more than twenty seconds, it would lead to a positive answer, and I wouldn't want to do that. I don't think it was hardly twenty seconds.

I have been in the yard service of the railroad since October 12, 1897, in the neighborhood of sixteen or seventeen years, and have been employed in the capacities of yardman, trainman, brakeman and engine foreman and conductor. During these years I have had occasion frequently to consult a watch and time different things as a railroad man does, but hardly figure down to seconds though. As a matter of fact our watches are regulated with the idea of our being able to get down to seconds, if necessary. I have done that for sixteen or seventeen years, but never had occasion to get down as closely as seconds. During all that time, or nearly all of it, I have had a watch, or supposed to have had. I can't tell you how much of that time I was without a watch, but different times I didn't have one, but arranged to get one

(Testimony of M. I. Chappel.)

as soon as I could; I was supposed to have one.

As to whether the interval of time between giving the first and second signal was as long as fifteen seconds I can't say. It might be eight or nine seconds or ten, and possibly it may have been fifteen. I imagine that it was [74] between eight and fifteen seconds. That is my best opinion at this time, my best judgment. I think that is a fairly accurate estimate of the time. I testified that there was no answer to signals I gave the engineer. I am talking about the same signals that Mr. Wheeler asked me about when I told him that I observed no answer from the engineer.

I have gotten answers to signals that I gave the engineer in the form of a blast whistle. The engineer does not, ordinarily, respond by blowing his whistle when I give him a signal to slow down. He does not respond to the signal to stop by blowing the whistle. I had no reason to expect him to on this occasion. But I expected him to comply with the signals. I did not expect him to answer the signals. The rules of the company provide for an answer to be given to signals under certain conditions. With reference to these two particular signals that I gave, there was no answer required, but it is "action" in that case.

At the time I saw the horses' heads they were just on the rail, on the south rail, at which time I was about thirty feet away, at the farthest. I don't think we were less than thirty feet, or more. I got off this step to get out of the accident; I foresaw myself. It was a precautionary measure with me. I stayed there

(Testimony of M. I. Chappel.)

as long as I deemed it was safe, then I got off. The accident happened almost immediately after I got off, or as soon as [75] the engine could reach the wagon at the rate of speed it was going and the distance it was from the wagon. The horses had gotten across the track when the engine struck the wagon. They had gotten entirely across. There is a foot-board to stand on on the end of the engine on which I stood. The head end of the water-tank hit the body of the wagon. At the time it was hit I was on the south side of the train on the ground.

Q. Now, state whether or not you were in view of the engineer at the time the water-tank, or the tender came along and hit the wagon,—were you in a position where you could have been seen from the north side of the train?

A. No, I was not. I say I was not—my lamp may have been in such a position that the lamp could have been seen before the space was closed up by the tender and the wagon.

Q. After you stepped off on the ground, I mean, could you have been seen from the north side of the train?

A. I ran along with the engine, keeping up with it to see if it was possible that the wagon was going to get out of the way.

I ran along with it until it hit the wagon.

Q. And you kept up practically with the extreme end of it? A. Yes, sir.

I was at the end of the water-tank at the time the water-tank hit the wagon. I did not collide with the

(Testimony of M. I. Chappel.)

wagon [76], myself. I was on the south side of the train. I was not ahead of the water-tank after I got off on the ground; there may have been a possible chance that my light, or lamp, could have been seen before the space was closed up; I am not saying that it was not seen, there was a possible chance that it may have been seen. I kept running with the train at the time the accident happened.

Q. And did you stand there in the road until the train came to a full stop?

A. I stood there until the train was almost to a stop, I don't remember if it was exactly to a full stop, my intention was to get to the other side as quick as possible to see what had happened to the team and the driver, if there was one.

Q. At what point did you cross the train to the north side? A. I couldn't tell you.

Q. Did you do it between the train or climb over any of the cars?

A. I went between the cars, over the draw-heads of the cars.

I don't remember just now which cars I went between. The cars between which I went were in the vicinity of the crossing. I don't remember whether the train was going at full speed when I got across on the other side. I had my lantern in my hand.

With reference to who were the persons on the north side of the train after I got over there [77] I don't know, I didn't see any one, I didn't look, I took a view of the team to see if there was a driver and see if he had hung on to the lines and been pulled

(Testimony of M. I. Chappel.)

over out of the way, and I immediately looked into the wagon and saw that the driver was not there, and I made a search for the driver to see if he was killed, and I went toward the engine and I found him between the second and third cars ahead of the engine. When I got over to the north side of the track I saw the team lying on the side of the track, which was at the end of the train to the rear of the engine. I found the team at the side of the track, about fifty feet, I imagine, from the crossing, probably sixty feet, it may have been a little more, but in that neighborhood. I went to look for the driver, and I found him. I am positive that I was the first one to find him. There was no one else there at the time, that I remember of. I don't know at the present time who was the next man that came there.

Q. Did you say that at the time you saw Mr. Clement he was breathing, that you saw him breathing, saw him gasping?

A. He was gasping at the time I went to him. In the first place I went to him and made this examination, I flashed my lamp in his face and looked at him.

I recall the time that my deposition was taken on the 25th day of February, in Butte, Silver Bow County, Montana, before Charles H. Little, Notary Public, concerning [78] the death of David Clement. I made such a deposition, and remember testifying at that time.

Q. I will ask you whether or not at that time and place Mr. Wheeler asked you this question: "Q.

(Testimony of M. I. Chappel.)

Were there any signs of life in the body at the time that you saw it first," and did you answer: "I could not tell." Did you so testify?

A. Well, I don't remember just how I answered that question, but I am answering it now.

Q. And I will ask whether or not Mr. Wheeler further asked you this question: "Q. You did not make an examination of it close enough to tell whether or not there was any—" and you answered: "No, I did not." Then the question goes on: "Q. —breathing or anything of the kind," and you made the answer: "No, sir." Did you so testify at that time and place?

A. I don't remember at this time, I remember of testifying that I considered him beyond all human assistance.

Q. I will ask you if at that time and place Mr. Wheeler did not ask you this question: "Q. Was any move made by the boy after you saw him?" and you made answer to that question: "A. Not that I could see."

A. Not as to the limbs or any portion of his body, the only movement that was visible at all was his gasping.

Q. Well, I am asking you if you so testified at that time and place? [79]

A. Well, I don't remember now, that has been a long time ago.

Q. I will ask you whether Mr. Wheeler at that time further asked you: "Q. Not that you could see?" and you answered, "A. No." Did you make

(Testimony of M. I. Chappel.)

that answer to that question?

(Hesitation by witness.)

By the COURT.—Q. The question is whether you remember of so testifying before Mr. Little as notary public?

A. I remember that I did testify, but it was two years ago.

Q. Well, do you remember that question being asked you and of giving that answer?

A. Not particularly, no.

Mr. FURMAN.—Q. How long was it after the accident before you saw the body?

A. Saw it as quick as I could get to it.

Q. I will ask you whether or not at the same time and place Mr. Wheeler did not ask you this question: “Q. Were you the first one that saw the body,” and you answered: “A. As far as I know.”

Mr. WHEELER.—He has already testified to that on this trial. That is not proper question of impeachment.

By Mr. FURMAN.—Were you asked this question by Mr. Wheeler: “Q. Could you tell whether or not the boy was breathing any at that time?” and you answered: “A. No, I could not.” [80] Did you so testify?

A. I don't remember what I told you before—you asked me the same question.

Q. Did you take hold of the body at that time?

A. No I did not.

I was at the coroner's inquest held over the body

(Testimony of M. I. Chappel.)

of David Clement on the 13th day of November, 1912, before Louis P. Smith and a jury, but I don't remember who the jury was. I remember of testifying at the inquest.

Q. I will ask you whether at the time you testified at the coroner's inquest Mr. Wheeler asked you this question: "Q. When you first saw the body I presume the man was dead at that time?" and you answered: "A. Yes, sir." Do you recollect whether you testified to that or not at the coroner's inquest?

A. I have not seen the coroner's inquest since.

Q. Do you recollect your testimony?

A. I don't recall exactly what the language was. I don't recall whether I made that answer or not.

I remember of signing a statement as to how this accident happened.

Q. In that statement, I will ask you whether or not in making your report to the company of how this accident happened you made the statement that contained this sentence: "Clement was badly cut and bruised and was dead when we got to him," I show you the statement and ask you [81] if you signed it?

A. As I answered before, practically the same, I did consider him dead, beyond any human assistance.

That is my signature; I signed that statement, but just what it contained I didn't know at the time. After looking at this statement concerning the accident, the statement that was made to the claim department of the Chicago, Milwaukee and Puget

(Testimony of M. I. Chappel.)

Sound Railway Company, it looks similar to the statement I signed, but I have not read it all through. That is my signature to the statement. I signed that statement, without reading it, it was written by Mr. Webb, the claim agent.

Mr. FURMAN.—We offer in evidence the portion of the statement that the witness' attention has been called to, as to the condition of Mr. Clement when he got to him. That is the only portion we care about at this time. I will read it in evidence, which is as follows: "Clement was badly cut and bruised and was dead when we got to him."

The WITNESS.—May I answer that question now? I made the answer at that time that I considered him dead, beyond any human assistance.

By Mr. FURMAN.—Q. Mr. Chapell, I am asking you, did you make that statement to the claim agent?

A. I possibly did if it appears there, although it was signed [82] up without my reading it over, which was very lax on my part.

Q. I will ask you whether or not in your statement to the claim agent with respect to how this accident happened on South Montana Street, in this city, David Clement, who lost his life, whether you made the statement to the claim agent as follows; with reference to the whistle and bell only, I ask you whether you made this statement to the claim agent or not: "We rounded the curve east of the Montana Street crossing,—engineer sounded the regular crossing whistle, engine bell was ringing?"

A. It so appears there. The engine bell rang

(Testimony of M. I. Chappel.)

east of the Montana Street crossing, that is what I said.

Q. But did you make that statement to him, to Mr. Webb? A. No, sir; it is not correct.

At the time the engine collided with this covered wagon, I did not hear any outcry of any kind, not that I remember of.

Q. I will ask you whether or not at the time you attended the inquest over the body of David Clement, Jr., and testified there, whether the coroner asked you to state in your own way just how the accident happened or occurred and whether or not you did not state at that time: "I saw a wagon and team approaching the Montana Street crossing from the south and the team was jogging at an ordinary little gate; there was no effort made and I couldn't tell [83] what the man was doing, but took it for granted that he would stop, as the view was equal; that is, mine and the man driving the team; the engine bell was ringing and I supposed that the man was going to stop." Did you so testify at the coroner's inquest?

A. I didn't testify that the engine bell was ringing at that point, no, sir.

Q. I will ask you whether or not at that time and place Mr. Furman asked you this question: "Q. The bell was ringing and the whistle blowing?" and did I understand you to answer: "Yes"?

A. I did not; it is impossible for anything of that kind to happen.

Q. And I will ask you whether or not you were

(Testimony of M. I. Chappel.)

asked about the exhaust on the engine that morning?

A. Yes.

Q. And you state, did you not, that the exhaust was going and could be heard for three quarters of a mile on a morning like that.

A. I believe that I answered that the engine had an exhaust which could be heard, everything being perfectly quiet in the neighborhood, but I don't believe that I remember of the exhaust coming from her at all.

I don't know whether the exhaust was working that morning or not. I don't see how I could have testified at the coroner's inquest that the exhaust was working on that [84] morning when I didn't hear it at all, I couldn't tell whether it was or not, I left that to the engineer. If I heard the exhaust on that morning I would say so.

Redirect Examination.

(By Mr. WHEELER.)

The WITNESS.—At the time the signal was first given that I have spoken of, it was the regular crossing whistle calling for one long and two short blasts, but they were cut very short, it was the usual habit at that time in the morning not to make any unnecessary noise.

Q. What have you to say with reference to whether or not it was a loud whistle?

Mr. FURMAN.—This is objected to as incompetent and immaterial. He has already testified that it was the regulation crossing whistle that had been given. It is objected further on the ground that it

(Testimony of M. I. Chappel.)

is repetition and improper redirect examination.

Objection overruled.

To which ruling of the Court counsel for defendants asked for and was allowed an exception.

A. It was not, it was low and indistinct.

With reference to the grade of the tracks there at the crossing, I estimated at about one-half of one per cent at the crossing, a kind of a water-grade. A water-grade is considered a grade where water will run freely of its own accord. [85]

Q. How many times did you visit that body, or see the body on this particular morning?

Mr. FURMAN.—I object to this as not proper redirect examination.

Objection overruled.

To which ruling of the Court counsel for defendants asked for and was allowed an exception.

This statement which was shown to me by Mr. Furman was written by Mr. Webb, the claim agent for the Chicago, Milwaukee and Puget Sound Railway Company. The statement was made sometime after the accident, I don't know just the date; there is no date which appears on the statement. The accident happened on the morning of the fifth, and I don't remember, but it occurs to me that the statement was made at a later date than that, it does not seem to me that it was the next day after the accident. I did not read this statement over before I signed it. I signed it down in the freight house of the Chicago, Milwaukee road, early in the morning, in the agent's office.

(Testimony of M. I. Chappel.)

Q. Will you explain to the jury how, if at all, this wagon was pushed along in front of the engine, if it was dragged by the engine?

Mr. FURMAN.—I object to this as calling for the conclusion of the witness, and not a statement of fact, and as improper redirect examination.

Objection overruled. [86]

To which ruling of the Court counsel for defendants asked for and was allowed an exception.

A. The wagon was caught on the footboard running along the rear end of the engine and across the rail—it would be about from fourteen to eighteen inches, this footboard, about the rail, and the east side of the wagon was caught on the footboard and slid along on the rail ahead of the engine.

Q. For what distance did that slide along in that manner?

A. It went the distance from the point of the accident to the point where the engine was stopped.

Q. And what distance would you say that was?

A. It was four car-lengths and a half and an engine-length.

Q. With reference to the condition of the body of the wagon, and I particularly refer to the floor of the wagon, did you notice that after the engine had stopped?

A. We picked the wagon and set it over to one side; I can't call to mind now the exact position of the bottom of the wagon, the exact condition, or what it was.

Q. What is your best recollection with reference to

(Testimony of M. I. Chappel.)

the floor of the wagon as to whether or not it was smashed up, or whether or not the floor of the wagon was still in shape?

Mr. FURMTN.—I object to this as repetition, the witness having already answered the question, and as leading and [87] suggestive.

The COURT.—He may answer. I do not remember of it having been answered before.

A. I can't recall as to the exact condition of the bottom of the wagon, although I do recall that the east of the wagon was completely, or almost, torn off, that would be east of the lower side of the top of the wagon.

I spoke about the wagon having been dragged four car-lengths and a half and an engine-length. The space between the cars was about three feet in the clear, and the distance between the tender and the next car to the engine was about the same. With reference to the distance between the tender and the engine, that was not included. The distance between the engine and the first car is about the same distance as it is between two cars.

Recross-examination.

(By Mr. FURMAN.)

The WITNESS.—If I remember rightly, Mr. Lon Stevens, the section foreman, and Mr. Mc-Masters were with me when we picked up the wagon. I testified that after the time I got off the head end of the engine I went up to the place of the accident. I don't remember whether I was exactly on the crossing, or approximately so. At a later time I

(Testimony of M. I. Chappel.)

came around the train and crossed through it. I crossed between the cars over the draw-heads, I jumped through, really. I was not in such a position that I could [88] see what was happening to the wagon after the accident happened up until the time the engine stopped; I couldn't see the full distance.

Q. Then your statement about the manner in which the wagon was slid along the rails is a conclusion from what you afterwards learned, and in other words, not from what you saw of it yourself?

A. It could not have went in any other way.

Q. But is it conclusion from what you know of the accident, and not what you actually saw at the time?

A. I didn't see it, actually, for I was not where I could see it.

Mr. FURMAN.—I move to strike out the testimony of the witness with reference to this, as to the manner of how the wagon slid along the rails for the reason that it is a conclusion and not a statement of any physical fact.

By Mr. WHEELER.—When the engine first struck the wagon you saw it then? A. Yes, sir.

Q. And you saw it for how long a distance after that?

A. I didn't see it after that until after it stopped and I went to the rear end of the engine.

Q. Was the wagon upset?

A. No, sir, only partially.

Motion to strike denied. [89]

(Testimony of M. I. Chappel.)

To which ruling of the Court counsel for defendants asked for and was allowed an exception.

(By Mr. FURMAN.)

The WITNESS.—I remember of being on the witness-stand and testifying in the District Court of this county in the case of James B. Glover against the Chicago, Milwaukee and Puget Sound Railway Company before the Honorable John B. McClernan, Judge, on the 24th day of March, 1914.

Q. I will ask you whether, while you were so testifying upon cross-examination by Mr. Furman you were asked this question: “Q. Now, I will ask you whether there was any other sound coming from the engine on that morning?” and you answered: “A. Why, the exhaust from the pump.”

A. Yes.

Q. And the further question was asked you: “Q. What sort of a noise was that?” and you answered: “A. That is the steam going off, it makes a noise that can be heard at a considerable distance; probably, if it was quiet and everything was still, it could be heard for half a mile.” “Q. As a matter of fact, it could be heard from the round-house up to the Montana Street crossing on a still morning.” “A. Oh, I wouldn’t say that far, unless it was clear and still.” “Q. On this morning what was the condition of the atmosphere and weather?” “A. It was clear and not stormy, or anything I could mention, to speak of.” “Q. Clear, crisp, fall morning?” “A. Yes, sir.” “Q. How far [90] would you say that the exhaust could be heard on this par-

(Testimony of M. I. Chappel.)

ticular morning? Of course, that's purely an estimate." "A. Oh, I imagine, to be safe, it could be heard at least a quarter of a mile."

A. I believe, had the exhaust been working at that time it could have been heard, under those conditions, if the exhaust was working at that particular time—

Q. But the question is, did you so testify or not?

A. Well, if it reads that way on that transcript I must have done it.

Redirect Examination.

(By Mr. WHEELER.)

The WITNESS.—There is no further explanation that I wish to make in regard to this transcript any more than I believe that a certain position of the brake valve governing the exhaust of that air pump—if the brake valve was in a certain position, the exhaust would not be working, although I don't see how I could testify to that unless they were working with it.

Recross-examination.

(By Mr. FURMAN.)

Q. I will ask you if at the time and place mentioned at this other trial, you made answer like this, in response to this question: "Q. Now, I will ask you whether there was any sound given from the engine on that morning?" and you answered: "A. Exhaust from the pump." Did you [91] testify to that on that trial?

A. If it reads that way I possible made that answer.

(Testimony of M. I. Chappel.)

I believe that is the only answer I wish to make. I believe I have answered the question as to whether there was any exhaust coming from the pump that morning. I can repeat it. I can answer as to the exhaust as to my memory, as to whether there was exhaust at that particular time I can't say that there was or was not.

Witness excused. [92]

[Testimony of W. J. McMaster, for Plaintiff.]

Mr. W. J. McMASTER, a witness called on behalf of the plaintiff, after being duly sworn, testified as follows:

Direct Examination.

(By Mr. WHEELER.)

My business is that of a switchman and have been employed on the railroad for eight years, having worked for the Penn, the Great Northern and the N. P. On or about the fifth day of November, 1912, I was working for the Chicago, Milwaukee and St. Paul railroad here in the Butte yards. I have heard the testimony given in this case with reference to an accident having taken place on that morning, and remember the time when the accident took place. I was riding on the rear car of this train that had the accident. As to the rate of speed that the train was going around that curve that morning, it was going at from eight to ten miles an hour, when it rounded the curve. At the point where it struck the crossing, the Montana Street crossing, it was going at a rate of speed of about six miles an hour.

(Testimony of W. J. McMaster.)

With reference to whether the bell was sounded on that morning, I think I heard the bell sound, but I didn't hear any steady ring. I heard the bell sound about seven hundred feet east of the crossing. The bell was not rung from that point up until it reached the crossing. I just heard it sounded once, about seven hundred feet east [93] of the crossing. I heard no other noises coming from that engine that morning, only the rattle of the cars.

Q. From your position, and from your experience with railroad cars, could you tell when the brakes were set?

Mr. FURMAN.—I object to this question as calling for a conclusion.

Objection overruled.

To which ruling of the Court counsel for defendants asked for and was allowed an exception.

A. Well, yes, I think the brake was set, or something that we felt that appeared as if the brakes were on, I could feel it coming that way to the hind cars.

The place where the engine was at the time I felt that motion, I imagine, was right at the crossing.

Cross-examination.

(By Mr. FURMAN.)

The WITNESS.—I supposed you could hear the rattling of the cars and the jar of the train on this morning a block or so away; there were twelve loaded cars on this train. The cars were loaded with coal and coke.

As to the weight of the train on this morning, I

(Testimony of W. J. McMaster.)

should say it was about seven hundred and fifty tons, I didn't count it up. This was a bright, cold, crisp morning. I didn't hear any exhaust from the pump on that morning, or the blower on the engine. I was twelve car-lengths from the engine. As to the length of the cars, I [94] will say that they have different length of cars, from forty to thirty-six feet, some are forty feet and some are thirty-six foot cars. The cars on this morning were about that length of cars. The space between the cars is about three feet, and is about the same between the head car and the engine, so that the length of the train, if they were forty-foot cars, would be twelve times forty, which would be four hundred and eighty feet, and then twelve times three are thirty-six,—or five hundred and twelve feet, approximately. Roughly, I would approximate I was five hundred feet from the engine. I suppose that I could hear the noise of that train for a distance of about a block, which is about eight hundred feet, I think.

Redirect Examination.

(By Mr. WHEELER.)

The WITNESS.—We were going down a grade that morning and around the curve. I should judge the grade is about one-half of one per cent, and I was on the rear end sitting on a car.

Recross-examination.

(By Mr. FURMAN.)

The WITNESS.—I never looked at any profile or map, or took any steps to inform myself about what

(Testimony of W. J. McMaster.)

the grade is. I would not say that the grade is three-fourths of one per cent. It is just an estimate on my part.

(By the COURT.) [95]

The WITNESS.—I was not switching these cars; we were going to the B. A. & P. transfer. They were switched already; we were making the transfer to this yard. We worked all night, but not at this particular spot; we worked switching cars back east of there. It is a common thing to transfer these cars through there night or day.

(By Mr. WHEELER.)

The WITNESS.—The air was coupled on to these cars on this morning, and coupled to the engine.

Witness excused. [96]

[Testimony of L. S. Groff, for Plaintiff.]

L. S. GROFF, a witness called on behalf of plaintiff, after first being duly sworn, testified as follows:

Direct Examination.

(By Mr. WHEELER.)

The WITNESS.—My business has been that of a railroad man for the past twelve years, having been with the Northern Pacific, Great Northern, Milwaukee, Western Pacific and Denver and Rio Grand. On the 12th day of November, 1912, I was in the employ of the Chicago, Milwaukee and St. Paul Railway Company. I am familiar with the switch engine known as No. 1163. I have operated that engine, it being under my charge as an engine foreman. Since I have been employed as a railroad

(Testimony of L. S. Groff.)

man I have acted in the capacities of freight brakeman, freight foreman, passenger conductor, switchman, switch foreman and yardmaster. I was engaged with the Milwaukee Company as a switch foreman, and also as engine foreman.

Q. Have you ever observed how quickly cars can be stopped when they are going at various rates of speed?

Mr. FURMAN.—I object to this question as calling for the conclusion of the witness on matters of air-brakes, and upon a matter which the witness is not qualified at all to give an expert opinion.

Objection overruled. [97]

To which ruling of the Court counsel for defendants then and there asked for and was allowed an exception.

A. Yes, sir.

I have observed it when the engine was attached to numerous cars. I was familiar with engine numbered 1163. I worked with that engine from September 9 or 10, 1912, until some time in September, 1913, when the engine was sent here.

I am also familiar with the grade of the railroad tracks of the Chicago, Milwaukee and St. Paul Railroad at the intersection of Montana Street with the Chicago, Milwaukee and St. Paul railroad track near Greenwood Street in the city of Butte. I have had occasion to switch cars in and around that place, and on that grade.

Q. I will ask you to state, in your opinion, in what distance that engine attached to twelve cars loaded

(Testimony of L. S. Groff.)

with freight weighing approximately seven hundred fifty tons, going at a rate of speed of six miles per hour over the railroad tracks of the Chicago, Milwaukee and St. Paul Railway Company on the curve as it rounds the intersection of Montana Street in the city of Butte, near Greenwood Street, running at the rate of about six miles an hour, and assuming that the air was connected with all these cars, also assuming that the engine was backing up with twelve cars attached to it?

Mr. FURMAN.—I object to this for the reason that the [98] *that* hypothetical question omits certain elements that are absolutely essential to be incorporated in the question, there being included in the question nothing with respect to the character of the rail or the atmospheric condition which would affect the rail; and nothing with respect to the diminution of the braking power during this time, or on the morning prior to the application of air to the time about which inquiry is being made; nothing with respect to the question as to whether or not the braking apparatus had been used at any time or at all during the few minutes preceding.

The COURT.—I think the question is sufficiently full. He may answer. The objection is overruled.

To which ruling of the Court counsel for defendants asked for and was allowed an exception.

A. Fifteen feet.

Mr. FURMAN.—I object to it further for the reason that it called for the conclusion of an expert on a matter of which the witness has not qualified to

(Testimony of L. S. Groff.)

give expert testimony.

Objection overruled.

To which ruling of the Court counsel for defendants asked for and was allowed an exception.

Q. What was your answer?

A. Fifteen feet.

I stated that I was familiar with this particular engine. [99]

Q. What kind of a light has this engine upon it?

Mr. FURMAN.—This is objected to as incompetent, irrelevant and immaterial for any purpose.

Mr. WHEELER.—I expect to follow this up by showing the kind of light it was.

Objection overruled.

To which ruling of the Court counsel for defendants asked for and was allowed an exception.

There was a kerosene headlight on the hind end of that engine, and there was also a light of the same kind on the head end.

Q. What have you to say with reference to the jar of the engine, whether or not there is a jar to the engine? A. Yes, there is.

Q. Is there any unusual jar on the engine?

Mr. FURMAN.—This is objected to as leading and suggestive.

Q. Well, state what its character is, the jar to the engine?

Mr. FURMAN.—I object to this as incompetent, irrelevant and immaterial, and does not prove or tend to prove any of the issues raised by the pleadings.

Objection overruled.

(Testimony of L. S. Groff.)

To which ruling of the Court counsel for defendants asked for and was allowed an exception.

A. There is a certain amount of slack, apparently, between the engine and tender where it is coupled together. [100]

Cross-examination.

(Mr. FURMAN.)

The WITNESS.—I first became acquainted with the engine No. 1163 about September 25, 1912, the first time I worked around it. I said I saw the engine previously, but hadn't been close to it. I think you understood me to say it was November 9 that I first began to use this engine, or when I took charge of it. I had ridden on, and used it prior to November 9.

On the fifth day of November, 1912, I was employed as a switchman. I was working extra, day and night, at different times. I have not run an engine, I am not an engineer.

Q. When and where have you tested engines so you know within what space they can be stopped?

A. From my own personal experience.

I have had experience of that kind on the Chicago, Milwaukee and St. Paul Railway.

Q. Where did you ever see an engine of this kind brought to a full stop within the distance of fifteen feet under conditions like those in this case?

A. My experience as a foreman of an engine; it is my duty to give my engineer signals to stop his train in spotting cars, etc.

Q. You have seen an engine, under circumstances like these, brought to a stop in fifteen feet?

(Testimony of L. S. Groff.)

A. Yes, sir. [101]

I have seen that done in the Butte yards, but not at that same crossing. I have seen it done in the Butte yards many times. I can't tell you just the times when I have seen it done.

Q. What circumstances fix such an incident on your mind, an incident when you saw a seven hundred fifty ton train stopped by an engine of the type and capacity of the engine 1163 in a distance of fifteen feet—did you ever see such a thing happen?

A. Yes, sir.

Q. Well, what fixes that fact on your mind?

A. Because I have done it.

Q. You have done it yourself?

A. Yes, sir, in spotting cars.

Q. When did you ever do it?

A. I have done it since I have been in the service of the Chicago, Milwaukee and St. Paul road.

I didn't keep track of the times that I have done it. I have done it several times in the Butte yards in spotting cars on the scales. We have brought trains of loaded cars right on them and shoved them on the scales going at the rate of six miles an hour. Six miles an hour is not very fast, I can walk that fast, and I have walked ahead of cars when they were going that fast, and in such a position I have seen them stopped in ten or fifteen feet. I have seen cars stopped in that space going at a rate of [102] five or six miles an hour. I have spotted cars of concentrates in the Milwaukee yards. This would be when

(Testimony of L. S. Groff.)

I was approaching the scales to weigh the concentrates.

Q. Are the scales at which you weigh the concentrates upon a grade of three-fourths of one per cent?

A. Practically the same at these scales as it is at the crossing; about the same as the crossing, I should judge.

With reference to the distance that these scales are from the crossing, the scales are in the Butte yards and the crossing is on Montana Street. I did not say that the Butte yards are all on the same grade as that of the Montana Street crossing. At the point where the scales are there is a little grade. I said that I knew the per cent of grade at the crossing of Montana Street. I judge it to be one-half of one per cent; that is my opinion. That is practically the same grade as at the scales. I said I have observed the distance in which I have made that stop within fifteen feet while I was switch foreman. I have observed it numerous times, stopping cars of stock. I have shoved up from seven to eight, ten and twelve cars of concentrates to the scales at a time. I have not frequently seen twelve loaded cars shoved up to be weighed at once. I don't know that I have seen that particular number of cars shoved up at one time.

I know something about the braking efficiency of air [103] on cars from my own practical experience.

Q. If you can stop twelve loaded cars in a distance of fifteen feet, how long would it take you to stop twelve empty cars—in what distance?

(Testimony of L. S. Groff.)

A. Well, they should be stopped as quick, if not quicker.

I would estimate the greatest distance that would be required to stop twelve empty cars going at six miles an hour, at ten feet. The weight of an empty car is from eighteen to twenty-two tons, or from thirty-six to forty-four thousand pounds. As to the weight of a loaded car, depends upon what it is loaded with. If it is loaded with coal and coke the weight would run from fifty to sixty, sixty-two or sixty-four tons to the car, or a hundred and twenty-five thousand pounds, depending upon the size of the car and what it was loaded with. A loaded car of coal will weigh about a hundred and twenty-five thousand pounds, around there some place. Forty thousand pounds is a fair estimate of the weight of an average car. I don't know whether an extra loaded car, including the car, itself, will run as high as a hundred fifty to a hundred and seventy or a hundred and eighty thousand pounds. These gondola cars will run about sixty to sixty-five tons. I think there is a greater braking efficiency when the car is loaded than when it is empty. I think a loaded car will stop quicker than it would if it was empty, or as quick—I wouldn't say quicker, but as quick. [104]

Q. Don't you know, as a matter of fact, that an empty car is arranged with a braking apparatus that has about a seventy per cent efficiency; that is to say, a car that weighs forty thousand pounds will have a braking efficiency of between seventy and ninety per cent, from twenty-eight thousand pounds to thirty-

(Testimony of L. S. Groff.)

five thousand pounds braking efficiency?

A. Yes, sir.

I say, in my opinion, you can stop a loaded car practically as quick as an empty, under these conditions. An empty car, we will assume to weigh forty thousand pounds, and you can stop it under these conditions within a distance of fifteen feet. Under the condition that has been named in this case, if the car is loaded to a hundred thousand pounds, it can be stopped in fifteen feet. I am still working for the Milwaukee.

Q. Have you been discharged, or are you in their service now?

A. Yes, I worked my last shift on December 23d.

Q. You have had a claim for damages which has been settled?

Mr. Wheeler was my attorney and secured a settlement against the Milwaukee road for alleged damages.

(By the COURT.)

Q. You did not mean that you were now working for the company? [105]

A. I have not been discharged.

Q. But you are not working for the company?

A. No, sir.

Q. You think you may be called at any time?

A. So far as I know, I don't know anything to the contrary, I went to the railroad office and made inquiry, and they told me if there was anything against me they knew nothing of it.

Witness excused.

[Testimony of W. A. Ury, for Plaintiff.]

W. A. URY, a witness called on behalf of the plaintiff, after being duly sworn, testified as follows:

Direct Examination.

(By Mr. WHEELER.)

The WITNESS.—My occupation is that of a railroad man, having followed that line of work nineteen years, last fall. I have acted in the capacity of brakeman, conductor, switchman, and assistant superintendent, or trainmaster. When I speak of being a conductor, I meant that I had been conductor on both freight and passenger trains. I have [106] worked on the Lake Shore, the Pennsylvania Line, the C. H. D. Big Four, the Canadian Northern, the Great Northern, the Milwaukee, the O. R. & N. and the Northern Pacific. This has been during the past nineteen years.

Q. Have you had occasion to observe in what distance engines attached to cars could be stopped?

Mr. FURMAN.—This is objected to for the reason that the question is too indefinite to permit of an intelligent answer.

A. Yes, I have observed them.

Q. Under what conditions have you had occasion to observe them? A. Under all conditions.

Q. What were you particularly doing at the various times when you observed it?

Mr. FURMAN.—I object to this for the same reason I objected to the last question, and as repetition.

Objection overruled.

To which ruling of the Court counsel for defend-

(Testimony of W. A. Ury.)

ants asked for and was allowed an exception.

A. Well, in all the different capacities that I have been engaged in.

I have never run an engine as an engineer.

Q. I will ask you Mr. Ury, assuming that an engine was backing, a switch engine, weighing sixty-five tons, I think the evidence shows, fifty or sixty tons, was backing [107] and drawing twelve cars loaded to a capacity of about seven hundred and fifty tons, going at a rate of six miles per hour around the curve, a slight curve, and going down a grade of about one-half of one per cent, downgrade, where the air is connected with all cars from the engine, and assuming that the engine was in good condition, how long, or in what distance could you stop that engine, or in what space could you stop it, under these conditions?

Mr. FURMAN.—I object to this question on the ground that it is a hypothetical question and does not include all the essential elements that should go into a question of that kind.

The COURT.—This witness is speaking from his practical experience. The court thinks it is sufficient, he may answer.

To which ruling of the Court counsel for defendants asked for and was allowed an exception.

A. Under the conditions you have named, I would say not to exceed fifteen feet.

I know what a fan-tail tender is.

Cross-examination.

(By Mr. FURMAN.)

The WITNESS.—I never ran an engine myself as

(Testimony of W. A. Ury.)

an engineer. I have seen trains brought to a stop under the circumstances as outlined by counsel for plaintiff here, time without number, and if you wish one particular instance I will give it to you. Under the same circumstance [108] would be the same working action of air, the same braking power and action, practically the same emergency space of air on the engine.

Q. I don't care anything about that, I would like to have you answer my question that was asked, I have asked you if you ever saw a train brought to a stop under the circumstances as outlined by counsel for plaintiff here. Answer the question if you can.

A. I will give you another.

Q. I am asking you for the one instance?

A. On the 25th of June, 1909, on the Canadian Northern.

Q. Can you think of any other instance?

A. Not as to any exact date.

The Gondolas vary in weight. They vary from eighteen to twenty-two tons, weigh about thirty-six thousand pounds. The weight of a Gondola car of this size, loaded with coal would run about seventy tons, the Gondola and load. A Gondola car loaded can be brought to a stop in practically the same space as an empty Gondola, under the same conditions.

Q. Do you know the braking efficiency of an empty Gondola of eighteen tons, what percentage of the weight of the car can be applied to the shoes of the brakes?

A. No, not as to the exact percentage, technically I don't.

(Testimony of W. A. Ury.)

Q. It is from seventy to ninety per cent. Well, I would not say as to the exact per cent, as to the [109] technical part of it.

I do know about how quick it can be brought to a stop without knowing it from a technical standpoint.

Q. Assuming that you have got an empty gondola that weighs eighteen tons, and then in that Gondola you put a load of fifty-two tons, so that the entire Gondola and load weighs seventy tons. Now, then, what has been the effect on the braking power by putting in that load of fifty-two tons? Would it increase or decrease the braking power?

A. Under the circumstances, it has not effected it perceptibly at all, under the circumstances mentioned.

Q. Has the brake-pipes or air reservoirs been changed by putting in the load? A. No.

Q. The braking apparatus is just the same in all respects as before putting in the load.

A. Yes, sir.

Q. You say it was just as easy to stop it as it was, going six miles an hour, just as easy to stop an eighteen-ton Gondola, loaded or unloaded, under these circumstances?

A. Practically the same, under the same circumstances.

Q. You are the same Mr. Ury who testified against the Milwaukee in a case in the District Court entitled A. B. ——— vs. Milwaukee and St. Paul Railway Company? A. Yes, sir.

Q. And you have at this time a personal injury

(Testimony of W. A. Ury.)

lawsuit of [110] your own, in which Mr. Wheeler is your attorney, pending against the Northern Pacific? A. Yes, I have a case.

The case is for damages which I allege I sustained in the railroad service. Prior to that I made no settlement for any other injury.

Redirect Examination.

(By Mr. WHEELER.)

The WITNESS.—I witnessed the accident to Mr. Page, the case in which I testified against the Milwaukee, which occurred in the Harlowton yard. I was working for the Milwaukee at the time.

Q. You said, in answer to Mr. Furman, that a Gondola loaded, or empty, could be stopped in practically the same distance going at a rate of six miles per hour. Just explain to the jury why that is.

A. Well, the weight, going at that rate of speed, the weight of the car, the displacement, would not have any effect going at that speed, over the empties.

Q. Supposing it was going at a rate of twenty miles per hour?

A. That would increase it slightly.

Recross-examination.

(By Mr. FURMAN.)

The WITNESS.—I said I saw the accident to Albert Page in the Harlowton yards. I did not witness the killing. [111] I don't want the jury to understand that I saw the killing. I didn't take his question that way. As a matter of fact, I didn't see the killing.

Witness excused.

[Testimony of Warrington Richards, for Plaintiff.]

WARRINGTON RICHARDS, called as a witness on behalf of the plaintiff, after being duly sworn, testified as follows:

Direct Examination.

(By Mr. WHEELER.)

The WITNESS.—My occupation is that of an undertaker. On or about the morning of the fifth of November, 1912, I had occasion to go to the intersection of the Milwaukee and St. Paul railway tracks with Montana Street, near Greenwood Street, in the city of Butte. At that time I found the body of a person there. As near as I can remember the body was found about three hundred yards east of the Montana Street crossing of the Milwaukee road. The body was scattered from the crossing about three hundred yards east; at least that is where we found the wagon.

By the COURT.—The Court does not understand. Do you mean [112] that the crossing was three hundred feet east of the body?

A. No, all the way it was covered with body, the body was strewn and scattered all along on the tender and engine about three hundred yards west of the crossing; the train at the time was going west.

(By Mr. WHEELER.)

The WITNESS.—With reference to where the body was found, if I remember correctly—of course it is quite a while ago—but if I remember rightly the body was lying somewhere either under the engine or the first car back of the engine, I cannot exactly

(Testimony of Warrington Richards.)

recollect at the present time.

The condition of the body when I found it was in bad shape; it was badly damaged. I don't remember at the present time in what way it was mangled or how it was cut.

I don't remember now whether I testified at the coroner's inquest, or whether I had my assistant.

Q. Refreshing your memory, I will ask you if this question was not asked you at the time of the inquest on the 13th day of November, 1912: "Q. What condition was the body in," and didn't you answer: "A. Well, we found the top of the head from the bridge of the nose up completely crushed; in other words, it was severed right across and the left arm was cut off between the elbow and shoulder, and the left leg was cut off right at the knee; the right leg was cut off just above the shoe top and the remainder of [113] the foot left in the shoe. Outside of these injuries there was not a scratch on the body." Do you remember of so testifying?

A. I remember it now, yes.

Q. Was that the condition of the body as you found it? A. Yes, it was.

I got there to where the body was about a half an hour after the accident happened, I don't just remember the hour. I know it was dark—I remember that because we *met horse* that someone was driving at the time that I think had a broken leg, and we missed running into the horse with the machine by a narrow margin.

Q. I will ask you if you did not testify at the

(Testimony of Warrington Richards.)

coroner's inquest that it was about ninety feet, or [I will ask you if you were not asked this question and if you remember of making this answer: "Q. Was there any effects shown immediately upon the crossing, any obstructions or anything like that?" and you answered: "A. Well, when I examined it down there, Mr. Coroner, it looked to be about seventy-five feet, probably, or ninety feet from what is called the frogs of the track. We found a good deal of flesh and bone as though certain portions of the body had been crushed between the frogs where we found these brains and bones scattered on Montana street. There was no evidence of crushing by the wheels." Do you remember making that statement? [114]

A. I remember now that the wagon was scattered along in front of the engine and we found lots of milk scattered all over the engine; I remember of going down there about eight or nine o'clock, as soon as we could get turned back, to see if we couldn't find and pick up what we could not find when we got the body.

Cross-examination.

(By Mr. FURMAN.)

The WITNESS.—I am a busy man and my memory of this accident has been clouded by lapse of time and other business between that time and now. My memory was clearer at the time the accident upon these things and was clearer when I gave my testimony at the coroner's inquest than it is now.

Q. I will ask you if you remember this question

(Testimony of Warrington Richards.)

being put to you, I think, by the Coroner: "Q. Did you look to the east to see if there was any sign or token of the accident?" and you answered: "A. Yes, it was dark." A. Yes.

Q. And was this question asked you: "Q. Did you in the morning?" and your answer was: "A. Yes, at nine o'clock; there was nothing to show only where the body lay." "Q. That was seventy-five feet west of the crossing?" and then there is a——, and you are then asked: "Q. Did you measure the distance from the crossing to where you found the body?" and you answered: "A. No, sir." Do you [115] recollect of testifying to that?

A. Yes, sir.

My memory being refreshed I remember of saying that the top of the head from the bridge of the nose up was completely crushed. As I remember it now, it was right across from the top to the bridge of the nose. I remember saying that the left arm was cut off between the elbow and shoulder, and the left leg was cut off right at the knee, and that the right leg was cut off just above the shoe top and remainder of the foot was left in the shoe. I also remember of testifying that there were no further scratches on the body. That part of the body was clear.

(By the COURT.)

The WITNESS.—I presume I got notice of the injury by telephone. My place of business is possibly three-quarters of a mile or a mile from the scene of the accident, and I drove down with a rig. It was

(Testimony of Warrington Richards.)

dark at the time, we had lights on the machine, headlights. I said that we nearly ran into someone; there was a horse that was driven on a wagon that I thought had a broken leg at the time, I thought he had time to get out of the way, I didn't know at first that the horse was injured until we got up close to him and I saw he was unable to move. I spoke of the body being scattered along on the track. We found the brains and bones scattered along the rails. I mean by bones, bones of the body, limbs, legs and arms. [116]

Redirect Examination.

(By Mr. WHEELER.)

The WITNESS.—We made an examination of the body after getting it to the undertaking parlor; we always do that.

Q. I will ask you, remember testifying at the coroner's inquest as follows: "Q. Who called you, Mr. Richards?" "A. We were called from the police station." "Q. Who made the identification of the body?" "A. If I am not mistaken Mr. Chappell telephoned me about nine o'clock in the morning." "Q. What time did you go down there?" "A. We were called at four-thirty and got down there just as fast as an automobile could take us there." "Q. Immediately after the accident?" "A. Yes."

(By the COURT.)

Q. To what extent were the brains removed from the cavity when you found the body?

A. As near as I can remember, the entire top of

(Testimony of Warrington Richards.)

the head was gone, that was inside, all the brains were scattered.

(By Mr. WHEELER.)

Q. The first part of the body that you found was about how far from the crossing, do you remember?

A. I don't remember now, I knew at the time I answered that question and I answered it to the best of my ability.

As I understood it the forks of the track were right [117] near the switch where the fork divides, and separates from the main line.

Q. I will ask you if you did not say this upon your examination before the coroner: "Well, when I examined it down there, Mr. Coroner, it looked to be about seventy-five feet, probably, or ninety feet *from* is called the frogs of the track." A. Yes, sir.

Q. That is where you found the first portion of the body, wasn't it? A. Yes, sir.

Witness excused.

[Testimony of E. S. Rainey, for Plaintiff.]

E. S. RAINEY, a witness called on behalf of plaintiff, after being duly sworn, testified as follows:

Direct Examination.

(By Mr. WHEELER.)

The WITNESS.—My occupation is that of railroading, and have been employed in that line of work for about nine years as locomotive fireman, and locomotive engineer, having worked for the Northern Pacific and Great Northern Railroad [118] companies. My experience in railroading has been in Montana, I was employed on the Rocky Mountain

(Testimony of E. S. Rainey.)

Division of the Northern Pacific, which is west of Butte. As such engineer I have had occasion to stop and start trains, and I have had occasion to stop them by throwing the emergency brake on.

Q. I will ask you this question, Mr. Rainey: Assuming that an engine weighing, approximately, sixty tons was backing up and drawing twelve cars, twelve gondalo cars, loaded with coal and coke over a grade of one-half of one per cent and going at the rate of six miles an hour, where the cars were connected with the air, and the air was also connected with the engine, and assuming that the braking power was in good condition, in what distance could you stop a train under such circumstances by applying the emergency application?

Mr. FURMAN.—This is objected to for the reason that the hypothetical question does not contain sufficient of the essential elements to enable the witness to answer intelligently and fairly, and does not contain sufficient of the conditions to enable this question to be answered at all.

The COURT.—I think it sets out a situation which he could fairly answer. The objection is overruled.

To which ruling of the Court counsel for defendants asked for and was allowed an exception.

A. About thirty feet, I should say. [119]

Cross-examination.

By Mr. FURMAN.—Q. If, in addition to the facts as stated by Mr. Wheeler on this particular morning the rail was frosty, and cold, and if in addition to

(Testimony of E. S. Rainey.)

that the grade was steeper than was stated in the question, would that increase or decrease the distance in which the train could be brought to a stop?

A. Yes, sir.

Q. Now, supposing, in addition to that that a short while prior to making the emergency application, I mean immediately prior to that, there had been a slight service application of from seven to ten pounds, and then that had been released, and then before the reservoirs were recharged, and while the air line was overcharged, then the emergency application was made, wouldn't that increase the distance he would go before he could stop?

A. It would slightly increase it.

Witness excused.

Plaintiff rests. [120]

[Testimony of J. E. Woods, for Defendants.]

J. E. WOODS, a witness called on behalf of the defendants, after being duly sworn, testified as follows:

(By Mr. FURMAN.)

The WITNESS.—My full name is J. E. Woods and my occupation is that of locomotive engineer and employed by the Chicago, Milwaukee and St. Paul Railway Company, and on the fifth day of November, 1912, I was employed by that company in the Butte yards as locomotive engineer on engine No. 1163. That engine is what is commonly known and termed as a switch-engine, belonging to the switch service.

On the morning of this accident we were pulling twelve loaded cars of coal and coke, merchandise and

(Testimony of J. E. Woods.)

stock. That train was made up in the Butte yards, about a quarter of a mile from the crossing at Montana Street. With reference to our destination on that morning we were about to transfer this stock to the B. A. & P. yard. The fireman that I had with me on that morning was a fellow by the name of Byers. He is dead now, I understand.

Q. I just want you to describe a little bit about the switch-engine you were using, 1163, how is that constructed?

A. It is constructed with footboards on both ends and on the rear end it has what is called a sliding tender, and it has two kerosene lights, one on each end.

It does not make any practical difference which way that engine is going, backing or going ahead, not in regard [121] to the lights anyway. On this particular morning at the time of the accident the engine was backing up, and going west. I was on the south side of the engine.

Q. Did you see Mr. Chappell immediately prior to the accident?

A. I saw Mr. Chappell when he gave the sign to leave the yard; the next time I saw Mr. Chappell was when he jumped off the footboard.

This was near the Montana Street crossing. He jumped off on my side of the engine. The reason why I was on the south side of the engine when I was going west was because the engine was backing up.

Q. Now, will you state at what rate of speed your

(Testimony of J. E. Woods.)

engine was running, and your train was going, at a point we will say, four or five hundred feet east of the crossing, and before you came in sight of the wagon?

A. Eight miles an hour, I should judge.

I had made an application of the brakes, and had it released just prior to coming in sight of the team. With reference to the number of pounds of pressure, I should judge it was from seven to ten pounds application.

Q. State whether or not that application had been released before you used the brake and came in sight of the team?

A. Just prior to that, just a few seconds.

I should judge I was about two hundred feet east of the crossing at the time I first saw the rig, but they [122] claim, according to measurements, it was about three hundred feet.

Q. At that point, two hundred or two hundred fifty feet, or from a hundred and fifty to two hundred feet, state whether you saw or heard the signal from your switchman on that morning.

A. No, sir; no signal at all.

I watched this rig from the time it first came into my sight. I would estimate that the rig was a hundred and seventy feet, or something like that, from the crossing at the time I first saw it. I should judge the team was going about five miles an hour. I didn't notice any symptoms of nervousness on the part of the team at all. I did not notice the lines on the horses' back until we got up to them, when

(Testimony of J. E. Woods.)

they were slack, just as near as I could see when I got up under the rays of the arclight. The point, with reference to the crossing, where I saw Mr. Chapell get off, I should judge was about ten feet from the crossing, or a little more, maybe.

With reference to whether I made any further application of air on this morning, when I saw that there was a possibility that the driver would not stop his team, why I threw the brake valve into the emergency; I got the emergency into position about seventy-five feet from the crossing. We hit the wagon after that. There was no precaution that I could have taken which would have enabled [123] me to stop the train in any less distance than I did actually stop it from the time I put on the emergency brake. I did not see the boy at any time at all before the accident. So far as I saw, there was no indication that there was any driver in the rig at all. The rig was about a hundred and twenty feet, or a little more, from the track at the time I thought that there would be an accident. The rig was that far away. At that time I made an emergency application. I had twelve cars on the train that night. The weight of the train that morning, I should judge, would be about seven hundred tons. I blew the whistle of the engine on that morning about three hundred feet east of the crossing one long and two short blasts of the whistle. There is no way to hold down, modify, soften, or diminish the noise that is made by the whistle on that locomotive. The bell was ringing at the time

(Testimony of J. E. Woods.)

I blew the whistle, and was ringing at the time of the emergency application, and the bell was ringing at the time the accident happened at the crossing.

Q. State whether or not there was any other noise, coming from any application on the locomotive at that time.

A. We had what you term a blower on the engine.

Q. What is the effect of that?

A. It makes quite a bit of noise.

This was in operation during the time I have testified about. You could hear that noise anyway a quarter of a [124] mile.

With reference to the atmospheric condition that morning, it was frosty. There was no wind, or blowing, it was a quiet morning. The accident happened about four o'clock in the morning. The rails were frosty on this morning. The rails were frosty at the crossing, and were for a hundred feet distance west of the crossing and for three hundred feet east of the crossing. The braking apparatus on that morning was in good condition.

Cross-examination.

(By Mr. WHEELER.)

The WITNESS.—As a servant of the company, I am required to know the rules of the company. I am acquainted with the rule which provide that the whistle shall be sounded one-half mile from stations, railway crossing, drawbridges and junctions, also eighty rods from highway crossings, and that the bell shall be rung and kept ringing until the crossing is passed. I am familiar with that rule. I blew

(Testimony of J. E. Woods.)

this whistle on this morning in accordance with that rule. I said that I blew the whistle three hundred feet away from the crossing; that was the second time I blew it.

I have been employed as an engineer since 1909.

Q. What were you employed at prior to that time?

Mr. FURMAN.—This is objected to as incompetent, irrelevant and immaterial. [125]

Objection overruled.

To which ruling of the Court counsel for defendants asked for and was allowed an exception.

A. Why, I was employed as an engineer, wiper, fireman, engine dispatcher and engineer.

I have been employed on the B. A. & P. and on the Chicago, Milwaukee and St. Paul railroad. I had been employed by the Milwaukee prior to the time this accident took place, since August 20, 1912.

I testified at the coroner's inquest. When I first saw this team coming, I should judge I was about two hundred feet distant from the crossing. I don't remember that I testified at the coroner's inquest that I should judge I was about three hundred feet from the crossing.

Q. I will ask you if this question was asked you by the coroner at the coroner's inquest held on the 13th day of November, 1912: "Q. When you crossed Montana Street that morning on the crossing, when did you get an intimation, or when did you get the first intimation that there was a team here?" "A. Oh, when I could see it about three hundred feet

(Testimony of J. E. Woods.)

away was the first intimation I could see of it." Did you so testify?

A. That must be right; then I remembered it better than I do now.

I was three hundred feet away from the crossing when I saw the team coming. When I saw the team, it was [126] about a hundred and seventy feet from the crossing. The team had just driven up past the back of that house there. I saw the team plainly from the time I first got past the house until it struck the track. I watched it all the time. I noticed that there was no efforts made by the person driving the team from the time I saw until I struck it. I didn't see any effort made on the part of the driver to get out of the way.

I also saw Mr. Chappell get on the rear end of the engine on the footboard when we left the yards, and I didn't see him at any time after that until he jumped off. The rear footboard of that engine is pretty close to the tender; it is right at the rear end of the tender. You could not see a person when he is standing on the rear footboard, unless he is leaning out over the side; couldn't see him from where I was in the cab. I don't know that this is what is commonly called a fan tail tender. It is a sliding tender, sliding down to the front, and the height of the tender is eight or ten feet, I should judge.

Q. Where is the top of the tender with reference to where your head would be when you would be sitting in the cab window?

A. I could look right over the top of the tender.

(Testimony of J. E. Woods.)

The tender gradually slides down until it reaches a [127] height of five or six feet.

I said that when I got a distance of about seventy-five feet from the crossing I put on the emergency brake.

Q. What have you to say with reference to whether or not you used any sand, or whether there was any sand on the engine that morning?

Mr. FURMAN.—I object to this for the reason that there is no defective appliance *complained on* the part of the plaintiff, and no negligence in not applying sand upon the tracks, and no defects in the appliances on the engine.

Objection overruled.

To which ruling of the Court counsel for defendants asked for and was allowed an exception.

A. There was sand on the engine.

Q. Was there any sand put on the track by you?

Mr. FURMAN.—This is objected to for the reason that they are seeking now to establish a different kind of negligence than they allege in their complaint.

Objection overruled.

To which ruling of the Court counsel for defendants asked for and was allowed an exception.

Mr. FURMAN.—I object to it further as not proper cross-examination.

Objection overruled.

To which ruling of the Court counsel for the defendants [128] asked for and was allowed an exception.

(Testimony of J. E. Woods.)

A. There was not; but it would not have done any good that night, or that time, on account of being on a curve and the air pressure from the sand-pipes would have thrown the sand to one side, and outside the rail. There was no sand put on the track by me.

It would not have done any good, and would not have added to the braking power to put sand on the track. I said that I put on a slight application of air. I can't tell you at what distance from the crossing I put on that slight application; I don't remember that now. I remember the distance at which I put on the emergency, however.

Q. How long a time was it from the time you put on that slight application, and then released it, until the time you put on the emergency?

Mr. FURMAN.—I object to this as incompetent and immaterial; he says he can't testify where he made the application.

By the COURT.—I think you are asking how long it was after he put on the service application before he put on the emergency. Your best estimate, Mr. Woods, is all that is asked for. The objection is overruled.

To which ruling of the Court counsel for defendants asked for and was allowed an exception.

A. I would say four or five hundred feet, I think, we ran.

Witness excused. [129]

Mr. WHEELER.—If it is satisfactory to the Court, I would like to call Mr. W. D. Fenner as a witness on behalf of the plaintiff at this time. He

(Testimony of J. E. Woods.)

was not here when we closed our case and I *would* *permission* of the Court to put him on the stand.

The COURT.—You may call him if you wish.

[Testimony of W. D. Fenner, for Plaintiff.]

W. D. FENNER, a witness called on behalf of plaintiff, after being duly sworn, testified as follows:

(By Mr. WHEELER.)

The WITNESS.—My name is W. D. Fenner, and am District Manager of the Equitable Life Insurance Company. I can tell the expectation of a man's life, as given by the table of expectancies of the insurance company, and of a person fifteen years of age. It would be forty-five and five-tenths, in other words, forty-five and a half years.

I can tell you how much money would be required to purchase for a person twenty-one years of age an annual income for life of one hundred dollars per annum. The cash that he would pay in would be two thousand three hundred and twenty-six dollars and twenty cents. It would cost a person twenty-one years of age to get an annual income of nine hundred dollars every year, \$27,914.20.

Cross-examination.

(By Mr. FURMAN.)

The WITNESS.—I am not testifying from my own knowledge, **[130]** but from a table given to me by my company and has been acted upon since 1859. My company shows the probabilities of life of a person fifteen years of age, forty-five and five-tenths years. That takes into consideration the

(Testimony of W. D. Fenner.)

physical conditions of the average person. That is an average. My company would not attempt to guarantee that any particular individual will live that length of time; not at all. I said that the costs of an annuity of one hundred dollars would be \$2,326.20, to procure an annuity of one hundred dollars a year. That is of a person twenty-one years of age. I imagine that that would be less than five per cent on the money paid in. These figures that I have given you do not include other things such as the items for my own service, agent's salary, or commission, or anything like that. There is no commission paid to anybody on the purchase on an annuity except to the person writing it. The District Manager gets nothing, and none of the other officers of the company get anything on an annuity, not to my knowledge, and I have reference to my own contract. I have agents working on these. If they sell an annuity I get no commission at all. I get no commission on an annuity at any time. I suppose the insurance companies do business for a profit, and it is done like other business of corporations. It is naturally run for profit. Upon every policy sold, and every annuity sold, there is an arrangement by which the insurance society will [131] get a profit out of it. Naturally their investment will have to make an income. The insurance companies get a profit out of every policy sold, and I presume it is so figured that they get a profit out of every annuity sold. I imagine that if they do not get a profit

(Testimony of W. D. Fenner.)

it is due to a mistake somewhere. The insurance companies do business on a profit basis.

Witness excused.

**[Testimony of J. A. Woods, for Defendants (Recalled
—Cross-examination).]**

J. A. WOODS, recalled for further cross-examination.

(By Mr. WHEELER.)

The WITNESS.—At the time I put on the emergency brake I was a distance of about seventy-five feet from the crossing. I believe that is what I testified to when I was on the stand before. That is correct, as near as I can remember. I can't say whether at that point the track is practically straight for a distance of twenty-five feet east of the crossing of the street line. I am not sure about that; I can't say whether it is or not. I said that the reason I didn't use sand was because I was on a curve; I also said that it *would have* had any effect on that curve.
[132]

Q. When you were on that crossing, and from the crossing running west was absolutely a straight track, was it not?

Mr. FURMAN.—This is objected to as calling for a conclusion.

Objection overruled.

To which ruling of the Court counsel for defendants asked for and was allowed an exception.

A. It was straight as far as I know—I would not swear whether it was straight or not, but I believe it is.

(Testimony of J. A. Woods.)

The team and the boy and the wagon were carried in front of the engine about two hundred feet; that is from the point of contact. I did not use any sand from the time I struck the team until I stopped.

Q. What are the rules of the company, Mr. Woods, with reference to the conductor who stands upon the front end, or the rear end, of the train—the one we are talking about—with reference to giving any signals in case he should see anything on the track?

Mr. FURMAN.—I object to this as incompetent, and for the reason that the witness is not qualified to speak with reference to conductors' business, and upon the further ground that the best evidence is not being called for.

The COURT.—If this man knows, he may answer.

To which ruling of the Court counsel for [133] defendants asked for and was allowed an exception.

A. Well, I don't know anything about conductors' business, the conductor's part of it.

Q. Well, you are supposed, as an employee of the company, to know the rules of the company?

Mr. FURMAN.—This is objected to as calling for the conclusion of the witness.

Objection overruled.

To which ruling of the Court counsel for defendants asked for and was allowed an exception.

A. The only thing I know of, when there is any danger of anything happening he is supposed to give a special signal.

I said on this occasion he never gave any signal,

(Testimony of J. A. Woods.)

unless he gave me a signal when he jumped off then I went back to the rear end. That was the only time he ever gave me any signal. I was watching for him all the time; I could see him all the time, that is if he had been where he should have been giving a signal. He was where he should have been when he was on the southwest corner of the engine, but he was not out on the side where I could see him. My head, when I am sitting in the cab window, is approximately a couple of feet above the tender. We went about two hundred feet after putting on the first application of air, maybe more. I can't say how long it took us to go [134] that two hundred feet, but it took us a certain number of seconds. I can't approximate the number of seconds.

The purpose of putting on the application was to slow up for the curve and the crossing. I put on from seven to ten pounds of air pressure and kept it on for a distance of about two hundred feet.

Q. Now, as a matter of fact, if you put on ten pounds of air pressure and you kept it on for two hundred feet, wouldn't it stop the engine, or train, going at the rate of six miles an hour?

A. We were going faster, probably a little faster than six miles an hour at that time.

I believe I stated that we were going about eight miles an hour. It is not a fact, if we were going at a rate of eight miles an hour, and I applied ten pounds air pressure, that it would have stopped the train in going a distance of two hundred feet. I don't think it would stop it. I am not an expert

(Testimony of J. A. Woods.)

on that matter. I am an engineer; I can't tell you whether it would nor not. When we want to stop the train, I should judge we would put on from fifteen to twenty pounds of air at a time. When we want to make an emergency stop we would put on more air than that. We would put on all we could get in, and you can draw from seventy to a hundred pounds. If you put on twenty pounds of air, going at a speed of six miles an [135] hour, or eight miles an hour, I couldn't state exactly in what distance the train could be stopped.

I will ask you in what distance, assuming that you were going at the rate of eight miles an hour over a grade of one half of one per cent, with the engine you had and in question here, the engine being in good condition, and the braking-power in good condition, the air attached to all the cars, the engine drawing about seven hundred and fifty tons, and supposing you put on the emergency, and you used every means at your control to stop it, at what distance could you stop that train?

Mr. FURMAN.—I object to this question for the reason that it does not include all the testimony of this and other witnesses with reference to the use of air for a distance before the emergency would be necessary. I believe that the evidence shows that there were ten pounds of air used for a distance of two hundred feet and then released; and there is nothing said in the question as to its braking power prior to the application of this air and the braking power after the use of ten pounds and its release. I

(Testimony of J. A. Woods.)

object to the question as incompetent, irrelevant and immaterial, also.

Objection overruled.

To which ruling of the Court counsel for [136] defendants asked for and was allowed an exception.

A. It ought to be stopped in eighty or two hundred feet, anyway.

I can't say whether it would be nearer eighty than two hundred feet. It would be my judgment of it; it is just my judgment about it, eighty to two hundred feet. That is the nearest I would approximate it. I first put on the emergency brake about seventy-five feet from the crossing.

I remember of testifying at the coroner's inquest before a jury on the 13th day of November, 1912.

Q. And do you remember that at that time I asked you this question: "Q. Whereabouts were you when you first put on the emergency brake?" and you answered: "A. I should judge one hundred and fifty feet east of the crossing." Did you make that statement? A. Not that I know of.

Q. You would remember if you did make it?

A. Yes, sir.

Q. I will show you this statement, and I will ask you to examine this portion here (indicating) and ask you whether or not you made that answer?

A. I guess that is the way I made it; it is in there.

When you put on air and release it, after having put it on, there is a little noise made by the escaping process. It is not very loud, you can't hear it very [137] far, just a few feet from the car.

(Testimony of J. A. Woods.)

Q. Would a person be able to hear it, provided he was sitting on the rear end of the engine—I will ask you if a person who was sitting on the end of the car on the retainer here (indicating) would be able to hear it?

Mr. FURMAN.—This is objected to as calling for the conclusion of the witness.

Objection overruled.

To which ruling of the Court counsel for the defendants asked for and was allowed an exception.

A. He might if the cars were not rattling, but if the cars were rattling he would not hear it.

I believe the retainers are on the same end of the car that the brakes are on. At the point of contact, or at the place where the accident happened, the train was going at about six miles an hour.

Q. Now, after refreshing your memory as to what you testified to at the coroner's inquest, would you say now that you put on the emergency brake a hundred and fifty feet east of the crossing, or seventy-five feet?

A. I should judge now, about seventy-five feet, as far as I can remember.

Q. You say that the testimony you gave at the coroner's inquest was incorrect?

A. I may have heard a little wrong and got out of the [138] way at the time.

Q. That was closer to the time that the accident took place than now? A. I guess it was.

Mr. FURMAN.—I object to this line of examination as purely argumentative, and I move to strike

(Testimony of J. A. Woods.)

the answer out for that reason.

Motion overruled.

To which ruling of the Court counsel for defendants asked for and was allowed an exception.

Q. What has occurred since that time to refresh your memory with reference to the time you applied the emergency brake?

Mr. FURMAN.—I object to this for same reason.

Objection overruled.

To which ruling of the Court counsel for defendants asked for and was allowed an exception.

A. Nothing that I know of.

Q. Never talked to the claim agent of the road about it?

Mr. FURMAN.—I object to this for same reason.

Objection overruled.

To which ruling of the Court counsel for defendants asked for and was allowed an exception.

A. Never talked to anybody about this matter, only I had a consultation with the lawyer about these matters. [139] I talked it over with the attorneys for the defendants.

Redirect Examination.

(By Mr. FURMAN.)

The WITNESS.—My attention was never called to the testimony I gave before the coroners at the inquest and I was never given an opportunity to read over the transcript of the testimony, either by the coroner or by his stenographer, or anyone else. I have no independent recollection at this time as to what my testimony was, except from this page of tes-

(Testimony of J. A. Woods.)

timony to which my attention has been called. I never saw that before. I have no reason to believe that I testified I put on the emergency brake a hundred and fifty feet east of the crossing, except from this printed page of testimony. That is all.

I had not worked as an engineer for the company prior to the time I started to work for the Milwaukee & St. Paul Railway Company. I started in for the Milwaukee as a boiler-maker and worked at that for about a month and then I went to work engine ——— for two or three months, and from that I hired out as an engineer for the Milwaukee.

Q. Did you ever work for anybody else?

A. Yes, for the Butte, Anaconda & Pacific.

Recross-examination. [140]

(By Mr. WHEELER.)

The WITNESS.—I have worked as an engineer before I went to work for the Milwaukee. Worked since 1909.

I testified as to the tracks being frosty on that morning. When I got down out of the engine I could see the frost when we walked around there. I did not make any particular observation of that, that is to make a particular examination,—I didn't get right down and examine the tracks, but I looked and I could see it just as you would at anything else, and I saw frost. There had been no other trains go over the track that morning before we did that I know of. I don't know whether there had or not.

Witness excused.

[Testimony of Frank L. Reily, for Defendants.]

FRANK L. REILY, a witness called on behalf of the defendants, after being duly sworn, testified as follows:

Direct Examination.

(By Mr. FURMAN.)

The WITNESS.—I am the official court stenographer of Department Two of the District Court of Silver Bow County, Montana, and was acting in that capacity during the trial of the case of James B. Glover vs. [141] Chicago, Milwaukee & St. Paul Railway Company on the 24th day of March, 1914, and took down the notes of the testimony of the witnesses given at that trial. I have my shorthand notes of the testimony of the witness M. I. Chappell taken at that time.

Q. I desire to refer you to your notes, and the portion I wish to call your attention to particularly is found on page 22 of the transcript, and I will ask you if you can tell from your notes whether or not the witness Chappell was asked by counsel for the defendant Company this question: “Q. Now, I will ask you whether there was any other sound coming from the engines on that morning?”

A. Yes, sir.

Q. And his answer was, “A. Why, the exhaust from the pump.”

A. Yes, sir.

“Q. What sort of a noise was that?” “A. That is a steam going off. It makes a noise that can be heard for a considerable distance; probably, if it was

(Testimony of Frank L. Reily.)

quiet and everything was still, it could be heard for a half a mile." Was that question asked and was that answer given?

A. Yes, sir.

"Q. As a matter of fact, it could be heard from the roundhouse up to the Montana Street crossing on a still morning?" "A. Oh, I wouldn't say that far, unless it [142] was clear and still." Was that question asked and did he make that answer?

A. Yes, sir.

"Q. On this particular morning, what was the condition of the atmosphere and weather?" "A. It was clear and not storming or anything I could mention, to speak of." Was he asked that question and did he make the answer I have read?

A. Yes, sir.

Q. Was this question asked him? "Q. Clear, crisp fall morning?" "A. Yes, sir."

A. Yes, sir.

"Q. How far would you say that the exhaust could be heard on this particular morning? Of course, that's purely an estimate?" "A. Oh, I imagine, to be safe, it could be heard at least a quarter of a mile." Was that question asked and that answer made?

A. Yes, sir.

Cross-examination.

(By Mr. WHEELER.)

The WITNESS.—I have no independent recollection of the testimony given at that time, outside of my notes. None whatever. I know that oftentimes

(Testimony of Frank L. Reily.)

stenographers make mistakes in their notes; we are not infallible. It is quite true, when there is noise in the courtroom, or when someone coughs, or if the [143] witness is indistinct a stenographer is liable to make a mistake and not catch the answer or question accurately.

(By Mr. FURMAN.)

The WITNESS.—I took the notes in the regular discharge of my duty as official court stenographer. I cannot discern from my notes any indication of disturbance in the courtroom, or any failure on my part to understand the questions or answers.

(By Mr. WHEELER.)

The WITNESS.—If there was any disturbance in the courtroom or any coughing, or anything of that kind, it would not appear in my notes, but if I can't hear I generally ask the witness to repeat, and if he does not repeat, I generally have in my notes "can't hear." That is the way I generally do it.

Witness excused.

[Testimony of Charles H. Little, for Defendants.]

CHARLES H. LITTLE, called as a witness, after being duly sworn, on behalf of the defendants, testified as follows:

Direct Examination.

(by Mr. FURMAN.)

The WITNESS.—I am occupying the official position of Official Court Stenographer of Department 3 of the District Court of Silver Bow County, Montana. [144] I am also a Notary Public. I was

(Testimony of Charles H. Little.)

present at the time of the taking of the deposition of M. I. Chappell in a case wherein David Clement was plaintiff and the Chicago, Milwaukee & Puget Sound Railway Company et al. were defendants. The deposition was given before me as Notary Public. I have no knowledge as to what became of the original transcript of the deposition. I have my notes of the testimony given at that time. I have them with me. This instrument which you show me is a carbon copy of the original transcript of my shorthand notes of the deposition, and is a true copy. I have made a comparison of that transcript of the deposition with my notes and it is correct.

Mr. FURMAN.—I will read such parts of this as I desire to go in the record at this time, with the Court's permission.

The COURT.—He says he has made a comparison. You may read it into the record.

Mr. FURMAN.—I will read from page 19.

“Q. Were there any signs of life in the body at the time that you saw it first?” “A. I couldn't tell.”

“Q. You didn't make an examination of it close enough to tell whether or not there was any—” “A. No, I did not.” “Q. —breathing or anything of the kind?” “A. No, sir.” “Q. Was any move made by the boy after you saw him?” “A. Not that I could see.” [145] “Q. Not that you could see?” “A. No.” “Q. And how long after you struck the wagon was it before you saw the body?” “A. Possibly a minute, maybe a little more.” “Q. Could

(Testimony of Charles H. Little.)

you tell whether or not the boy was breathing any at that time?" "A. No, I could not." "Q. What is your best judgment in the matter, with reference to whether or not there was still any life in the body?"

"Mr. FURMAN: We object on the ground it is repetition, calls for a conclusion. Testify to what you know." "Q. Answer the question, what is your best judgment in the matter?" "A. Well, I couldn't say, the body was in such a condition that I couldn't take hold of it."

Q. That was the testimony given by Mr. Chappell before you as Notary Public and transcribed by you?

A. Yes, sir.

Cross-examination.

(By Mr. WHEELER.)

The WITNESS.—I have no independent recollection of the testimony given by Mr. Chappell, outside of the notes I made. It is very often the case that a stenographer will make a mistake in transcribing his notes; but this deposition was read over to the witness by the notary before he signed it. It was read over to him and he swore to it before me as a notary public, and he swore that it was true and correct.

Witness excused. [146]

[Testimony of Ray Webb, for Defendants.]

RAY WEBB, called as a witness on behalf of the defendants, after being duly sworn, testified as follows:

Direct Examination.

(By Mr. FURMAN.)

The WITNESS.—I am with the Claim Department of the Chicago, Milwaukee & St. Paul Railway Company, and was so employed on the 6th day of November, 1912. I recognize the instrument which you show me, which is typewritten, as a statement I got from Mr. M. I. Chappell, Mr. M. I. Chappell gave me the information contained on that typewritten page the next day after the accident, on the 6th day of November, 1912, in the Freight Depot of the Chicago, Milwaukee & St. Paul Railway Company, in Butte.

Q. I will ask you to state whether or not at that time and place, Mr. M. I. Chappell made this statement to you: “Q. Clement was badly cut and bruised and was dead when we got to him.”

A. Yes, sir, he did.

Cross-examination.

(By Mr. WHEELER.)

The WITNESS.—I am the Claim Agent of the Chicago, Milwaukee & St. Paul Railway Company, and as such my duties are to get statements from employees and every [147] person who knew any thing about the injury immediately after the accident takes place. To the best of my knowledge this statement was made to me about eight o'clock in the morn-

(Testimony of Ray Webb.)

ing, right after Mr. Chappell came off duty. The statement was made in the Freight Depot of the Chicago, Milwaukee & St. Paul Railway Company. I don't remember who was present when the statement was made; I know Mr. McCann was the agent. I wrote the statement up right in the depot. I wrote it out on the machine myself. Mr. Chappell gave me the facts and I copied them down and handed them to him and he read them over and he signed them. This was around eight o'clock in the morning the day after the accident happened; it was right after he came off duty in the morning.

Q. Isn't it a fact that at the time this statement was made Mr. Chappell was on duty with the Milwaukee?

A. He was working for the Milwaukee, but he was working night shift, and it was after he came off shift in the morning that he came up to the depot in the morning and gave me this statement.

This statement was not given me before he came off shift. Neither was it made earlier in the morning, I don't know what time Mr. Chappell got off shift, but I told him to come up after he got through with his work, and he did come up. I don't know when he came [148] off shift.

Q. You say in this statement that the "engine bell was ringing." Nothing was said at that time with reference to when it was ringing, and there is nothing in this statement to show at what point this bell was ringing?

A. I don't remember whether there was anything

(Testimony of Ray Webb.)

in that statement or not. My object was to find out whether the bell was ringing at the time, and I took it from what he said that it was; that was my understanding of it.

I did not make notes of what he said and then write them out on the machine. The statement he made to me was, that the bell was ringing.

Q. But he didn't say that the bell was ringing at the crossing of Montana street, or at what point the bell was actually rung?

A. It says here: "Engineer sounded the regular crossing whistle, engine bell was ringing."

Witness excused. [149]

[Testimony of John Geach, for Defendants.]

JOHN GEACH, called as a witness on behalf of the defendants, after being duly sworn, testified as follows:

Direct Examination.

(By Mr. FURMAN.)

The WITNESS.—My business is that of locomotive engineer, and am employed by the Butte, Anaconda & Pacific Railway Company. I have been employed in the capacity of engineer about eleven years.

I have given the question of speed, air brakes and apparatus on a locomotive, or engine, some special attention and study. From a practical standpoint, I have, and have given it some theoretical study. I have had occasion at different times to observe within what distance, under stated conditions a train of a given weight may be brought to a stop. I understand something about coefficient friction. Coefficient

(Testimony of John Geach.)

friction would be to take the ratio of resistance of two pieces sliding over each other, the calculation of the amount of pressure it would have forcing them together. The coefficient friction is the greatest on slow speed.

Coefficient friction can be great enough at slow speed upon a frosty rail to entirely destroy the braking power on an engine, or car, so as to slide the wheels. From that question you have asked we have got [150] to infer and take the circumstances into consideration mentioned in your question. We have got the ratio of the adhesion between the wheel and the rail, and the ratio of adhesion is taken from this point, that is one-fourth of the total weight resting on the wheel and the rail. Now, then, from that point we will take the point of a frosty rail. It runs from one-fourth to one-fifth, one-sixth to nearly one-seventh of the ratio of adhesion; that would bring our point of adhesion down to really below the pressure of the brake-shoe on the wheel; this pressure of the brake-shoe on the wheel would be less than the adhesion between the wheel and the rail, and the consequences are when it is greater the wheel will slide, and nothing can prevent it. This has been tested out on the larger railroads of the country by means of the dynamometer machines that actually require the movement of the wheel on the rail with a braking power under these conditions.

Q. I will ask you to explain to the jury just the means by which brakes are applied through the agency of air brakes on an engine or train?

(Testimony of John Geach.)

A. First, we must consider that the air brake system is charged to a certain pressure, and that pressure, as soon as in that brake-pipe on the train line under the train, or cars, it leads to what is [151] termed an auxiliary reservoir under the cars, and in order to stop you have got to reduce the pressure in the brake-pipe. As soon as that is done, why the brake begins to immediately apply to the amount of pressure that is exerted on the opposite side of the triple piston, and as soon as that is worked out the pressure will fall from the auxiliary reservoir into the brake-cylinder.

(By Mr. WHEELER.)

Q. As I understand it, the auxiliary reservoir must be charged before the air will be in a position where it can be applied? A. Yes, sir.

Q. What is the pressure with which the auxiliary reservoir is charged?

A. The standard pressure is seventy pounds.

(By Mr. FURMAN.)

Q. In what time can the auxiliary reservoir be charged from an atmospheric pressure to a pressure of seventy pounds?

A. We usually take about eighty seconds.

Q. Is the air put into this auxiliary reservoir uniformly?

A. Well, from a certain standpoint it is, and another it is not. You will infer from my answer that it is, yes. That as the air brake system is charged we [152] put our brake-valve in full release position and we leave it there for a time being, that is,

(Testimony of John Geach.)

until the entire reservoir is charged, that is the auxiliary reservoir. Now, the auxiliary reservoir cannot be charged, in the same time that the train-pipe can be charged, due to the restricted flow of air to the auxiliary reservoir through the medium of a feed groove in the triple piston. This feed groove is made necessarily small to prevent the brakes on the head end of a train of over five cars charging all of the cars behind these five cars. If this were not so, the cars on the head end would become charged to an unnecessary high pressure, and the cars behind these five cars would receive little or no pressure, for the time being. This makes the uniform recharging of trains, or cars, more equal.

Q. I will ask you whether or not there is any practical difference in the time in which cars may be charged, up to the number of four or five, if four or five cars can be charged in practically the same length of time as one?

A. Yes, up to about five cars. Yes, it would be very materially, depending upon how soon after releasing the brake is reapplied, as there is a time limit we must consider in which the system can be recharged.

Q. Well, as I understand your testimony, when there has [153] been a service application of from seven to ten pounds run down the brake-pipes of air pressure, that air immediately after the service application has been released,—would it have any effect upon the reapplying of the brakes?

A. Yes. The reason for this restricted recharge is

(Testimony of John Geach.)

due, to the small feed groove by the triple piston through which the air in the brake-pipe must necessarily pass in order to charge the auxiliary reservoir.

Q. Now, just assume this condition: Assume that there has been a service application of air of from seven to ten pounds, which has been continued for a little space, sufficient for it to begin to take, and then it is released, and then, thereafter, in a very short while, there is an emergency application. Now, what have you to say as to the braking capacity of the apparatus under conditions like I have mentioned?

A. Under those conditions, we have got to consider, first, that we have put this air into the brake-pipe under the cars. As I stated before, that brake-pipe will actually overcharge itself without the auxiliary reservoir being charged. Now, if we make what we term an application, we must release that pressure in the brake-pipe before the brakes can be recharged and begin to be applied. As I said before, this restricted recharge is necessary because of the small [154] feed groove by the triple piston.

Q. I will ask you this question: We will assume that there is a freight-engine, or switch-engine, of from fifty to sixty tons weight drawing a train of twelve cars loaded with coal and coke of an estimated weight of seven hundred and fifty tons; the switch-engine is running backwards drawing this train, it is going down a grade of 75/100 of one per cent. upon a curve, at four o'clock on a cold frosty morning in the month of November, and the rail is frosty,—cov-

(Testimony of John Geach.)

ered with frost,—at a distance of several hundred feet east of a specified crossing there is a service application of from seven to ten pounds, now, that service application has been continued for a space of a few hundred feet, one or two hundred feet, or something like that, possibly a little more, the service application has been released, and then after the train has gone farther on,—a few seconds—traveled perhaps one hundred feet, or a hundred and fifty feet, to a point seventy-five feet east of that specified crossing, where there is an emergency application made; at that time the train is going at a rate of speed of probably six miles per hour. In what distance will you say, and in view of all the circumstances and conditions I have related in this question, that train should be brought to a stop,—under those conditions? [155]

A. If I stopped it within one hundred feet, I think I would be doing a pretty good braking job. But under the conditions as stated, being a frosty rail, where the ratio of adhesion is almost entirely destroyed, we can infer only one thing from it. Where the ratio of adhesion is nearly, if not quite, entirely destroyed, there would be a case of wheel sliding, and the train would slide until the wheels were flattened sufficiently to produce friction enough between the wheel and the rail until the train would stop of its own accord.

Q. What effect would it have on a grade, instead of being one-half of one per cent, but seventy-five one-hundredths per cent.

(Testimony of John Geach.)

A. In that case it would be practically nominal; the point would be so technical in order to figure it out it would be rather a difficult mathematical problem; to see what the difference of twenty-five hundredths of one per cent would be would be a problem. The difference would be very little in the case of a wheel sliding over a difference of twenty-five hundredths of one per cent in the grade.

I am familiar with the braking apparatus of a Gondola car. The Gondolas really have no different braking apparatus than any other car, any more than as a general rule we take them from a practical standpoint, whether loaded heavier than other cars. Roughly, the [156] weight of an empty Gondola is a little over forty thousand pounds. The capacity of a Gondola, as it is stenciled on the outside, is a hundred thousand pounds.

Q. If a Gondola weighs forty thousand pounds, empty, and the braking capacity of that Gondola is seventy per cent, is the braking capacity of the Gondola increased in any manner by loading it?

A. Not to my knowledge.

Q. How many thousand pounds can be applied on the brakes of a loaded Gondola, the load being one hundred thousand pounds, the load itself being forty thousand pounds?

A. Figures will show; the first thing we have to do is to find the percentage of one hundred and forty thousand pounds, which is twenty per cent of the braking power.

Q. So the braking power of a loaded Gondola is

(Testimony of John Geach.)

twenty per cent, whereas on an empty Gondola it is seventy per cent? A. Yes, sir.

A loaded Gondola going at the rate of six miles per hour, in my way of working, cannot be stopped with the same braking power, and in the same distance, as can an empty Gondola.

Cross-examination.

(By Mr. WHEELER.)

The WITNESS.—These Gondolas are marked on the [157] outside as having a capacity of a hundred thousand pounds. I have no knowledge of what these cars were loaded with on this particular morning, except what has been said here in this case. I don't know whether it was twenty thousand pounds, fifty thousand pounds or a hundred thousand pounds. I don't presume to tell this jury what the braking power would be upon these particular cars, unless they are loaded to a capacity of a hundred thousand pounds.

I testified in the case of James B. Glover vs. Chicago, Milwaukee & St. Paul Railway Company.

Q. You were asked the question, were you not, with reference to what distance you could stop this particular train going at the rate of six miles per hour on a grade of one-half of one per cent, on a frosty rail, and you testified, did you not, at that time, you could stop it within a distance of forty feet?

A. No, sir, the remark I made at that time was, I would not like to get below forty-five feet. I would not go below that.

(Testimony of John Geach.)

While I have been engaged in the railroad business, it has been mostly on the Montana grades. I never made the statement that if I went beyond forty-five feet in making such a stop, going at that rate of speed, I would be constantly killing people.
[158]

If you put on application of say ten pounds of air on an engine, and you went two hundred feet, and you are going at the rate of eight miles an hour at the time you put on that application, the effect it would have upon the train would depend upon the braking power that has been developed. If you were going at the rate of eight miles an hour, on a grade of one-half of one per cent and you had twelve cars and an engine the same as has been described to me here in this case, the effect that it would have upon the question of slackening the speed, and how much it would slacken it, all depends upon the conditions. I have had a little experience as an engineer.

I said that it would take eighty seconds to refill the auxiliary reservoir, that is, provided it was completely empty. If the reservoir was charged to seventy pounds and you let out seven to ten pounds, we usually take about twenty-five seconds to refill it with the original seventy pounds. That is to replace the seven to ten pounds. It would only take eighty seconds to fill it with the full seventy pounds.

It was not necessary for me to get this information that I have been giving with reference to the application of air brakes, etc., out of any book, but I can probably produce three or four books containing the

(Testimony of John Geach.)

information. It is absolutely necessary to study the air-brake [159] system to obtain a knowledge of it. It is absolutely necessary. I studied it possibly five or six weeks ago.

Q. I will ask you if it is not a fact that if you put on ten pounds of air application, service application, on an engine drawing twelve cars similar to what has been described here, and under the conditions described here, and you put it on for a distance of two hundred feet, if it would not stop your train still?

A. That would depend largely upon whether the train was sliding, or whether the wheels were sliding.

Q. I am asking *you* to the facts as outlined to you in my question?

A. Yes, ought to stop within two hundred feet.

Q. And suppose you put on the seventy pounds you would say it would stop it in what distance?

A. Very little difference.

Q. Very little difference whether you put on the seventy pounds or ten pounds?

A. I stated, if the wheels were sliding there would be very little difference.

I said on a previous occasion, if there was no frost on the track and the wheels were rolling I would not say it could be stopped below forty-five feet. I don't believe it could be done in forty-five feet. I don't believe it could be done in sixty feet. It is [160] pretty hard to tell in what distance it could be done. Under these circumstances, as you have given me, it would run along, sliding on the track, and it is a physical impossibility for a man to come upon the

(Testimony of John Geach.)

stand and tell in what time it could actually be done in. *There certain* conditions under which it could be done quick. I don't know whether in my experience I have seen a train of twelve cars going at a rate of speed of six miles an hour, with an engine, stopped in forty-five feet.

I have observed in my experience as a railroad man the stopping of trains, and an engine, at certain rates of speed, and have been called upon to stop trains within a certain distance. If you threw it into what is commonly called the big hole, the effect of the distance in which you could stop the engine would depend entirely upon the conditions. The throwing of the engine into what is called the "big hole" means that the brakes apply at once. It does not mean the reversing of the engine. It is not a fact that you can stop your engine quicker by putting the air on and throwing into the reverse than you could by simply turning the air on. It is not a common rule to throw it into the reverse. The necessity for sanding the track depends largely upon the conditions, as I stated before in regard to the relation of adhesion; it will reduce the [161] ratio of adhesion to about one-fifth instead of one-sixteenth. If you sanded the track it would have a tendency to stop your engine quicker than if you didn't sand it. You generally put sand on the track when you want to make an emergency stop, but it does not always hit the track; but you always put it on. The sand is placed in such a position that it comes down through a pipe from the engine. That pipe is placed directly

(Testimony of John Geach.)

under the engine and over the track so the sand will go right down on the track when it is needed. The pipe leading from the engine goes down through the engine and immediately in front of the wheel of the engine, and comes down within a distance of two or three inches of the track, or four or five inches. The wheels do not have the same tendency to slide on the track when you put sand on it as they do when you do not. The sanding of the track, I admit, has a tendency to keep the wheels from sliding. I also admit that it has a tendency to stop the engine quicker when you sand the track than when you do not.

If you were going at a rate of speed of twenty miles an hour, under the circumstances that have been related to me in this case, you could probably stop the train in five or six hundred feet. I would not want to give a guess as to how quickly it could be stopped. [162]

Q. You want the jury to understand that you could not give any definite idea as to how soon it could be stopped, either going at the rate of six miles an hour or twenty miles an hour?

A. That would depend on the conditions, and upon whether there was any sand used on the rails.

Q. Well, suppose sand had been put on, in what distance would you say it could be stopped?

A. Probably four or five hundred feet.

Q. Going at the rate of twenty miles an hour.

A. Yes, sir.

If it was going at the rate of six miles an hour, and

(Testimony of John Geach.)

they had used sand, I should say it could probably have been stopped in two hundred feet. If the wheels were sliding, I would say that the brakes would have no effect. Under these conditions, I would say not.

I said that it took about eighty second to raise the pressure in the auxiliary reservoir from atmospheric to a seventy pounds pressure. I said it would take about half that time to put in fifty-five pounds.

Witness excused. [163]

[Testimony of George T. Spaulding, for Defendants.]

GEORGE T. SPAULDING, called as a witness on behalf of the defendants, after being duly sworn, testified as follows:

Direct Examination.

(By Mr. FURMAN.)

The WITNESS.—I am acting in the capacity of traveling engineer for the Milwaukee road. I have been employed in the railroad service about fifteen years. I worked as a wiper, locomotive fireman, engineer, and traveling engineer. I have been a traveling engineer about four years. I put in seven years as an engineer running an engine.

I am familiar with the space within which it is reasonable and probable that trains can be brought to a stop, under given conditions.

I am familiar with the Gondolas that are used by the Chicago, Milwaukee & St. Paul Railway Company. I am also familiar with the braking appa-

(Testimony of George T. Spaulding.)

tus on these Gondola cars. The weight of an empty Gondola car is forty thousand pounds. I am familiar with the braking efficiency of a Gondola of the kind in use by this Company. We have some of the New York Quick Action brakes, and some of the Westinghouse brakes. These are a good, efficient braking apparatus and are the kind usually in use. There is no practical [164] difference between the two brakes. There is none to my knowledge. The braking efficiency of a Gondola loaded to the capacity of forty thousand pounds is usually about seventy per cent. The braking power against the wheels would be about twenty-eight thousand pounds. The capacity of a Gondola is about one hundred thousand, the total weight would be, when it is loaded, about one hundred and forty thousand pounds.

The braking efficiency is not increased by the load. The load decreases the braking efficiency materially. When the car is loaded, there is no more than twenty-eight thousand pounds pressure against the brakes. An empty Gondola has twenty-eight thousand pounds braking efficiency against forty thousand pounds of weight, where a loaded Gondola has about twenty-eight thousand pounds against a hundred and forty thousand pounds load.

I am familiar with engine No. 1163. It is equipped with air-brakes of the standard make and efficiency.

Q. I will ask you to consider the following hypothetical state of facts: Assuming that switch engine

(Testimony of George T. Spaulding.)

No. 1163 is backing westward, pulling a train of twelve loaded cars with coal and coke, the total estimate of the weight of the train being seven hundred and fifty tons; and assume that it is going from the Butte yards [165] to the Butte, Anaconda & Pacific transfer, and at a point some hundred feet east of the Montana street crossing on a grade of one-half of one per cent, and upon a curve, the train is going at that time at a rate of speed estimated at from eight to ten miles an hour, and at that point a service application is made from seven to ten pounds pressure and continued for a known space, and then is released, and the train runs a little bit farther and then at a point seventy-five feet east of the crossing which I have mentioned, the emergency application is made; it is a clear, cold crisp morning in November, the rails are frosty; at the time the emergency brake is applied, or the emergency application is applied, the speed of the train is approximately six miles per hour. In view of those conditions, in what space would you say it was reasonable and probable that the train could be brought to a stop. There has been a service application of from seven to ten pounds put on for the purpose of reducing the speed of the train from the time of coming around the curve and the speed of the train has been slightly checked—probably two miles per hour—and then a short while after this has been released, and the emergency application is applied, or is made.

A. Well, I should say, ninety feet; it would run upwards of ninety feet. [166]

(Testimony of George T. Spaulding.)

Cross-examination.

(By Mr. WHEELER.)

The WITNESS.—I would say it could be done in that space from the facts mentioned in the question. I took into consideration the condition of the rail, its being frosty, and the pressure in the brake, at the time, the fact of there being a slight application and then released, that is a service application.

Q. How long would you say it would take to fill up this tank, supposing you drew off seven pounds, seven to ten pounds of air, how long would it take to refill that?

A. Twenty-five seconds, I should judge.

Q. Now, assuming the facts to be that you are going at the rate of six miles an hour, that your braking power was in good condition, and that you had twelve cars attached to engine 1163,—which we will assume for the purpose of this question was in good condition, and the air and braking power was in good condition, and the train going down a grade of one-half of one per cent, and you used every means at your command, in what distance would you say that train could be stopped,—just eliminating the frosty condition of the track, and eliminating the service application? A. Eighty feet.

Q. Going at the rate of six miles an hour?

A. Yes, sir. [167]

Q. Would you say that, going along with twelve cars at the rate of six miles an hour over a one-half of one per cent grade, with an engine similar to 1163, a switch engine weighing sixty-five tons, and you

(Testimony of George T. Spaulding.)

used the emergency and sanded the rails, you could stop it in a distance of less than eighty feet?

A. You could if your sanders are working in perfect condition. Yes, if everything is in working condition, certainly you could.

Q. In what distance could you stop it under those conditions?

A. Perhaps ten feet, probably seventy feet.

You can stop an engine in a shorter distance by sanding the track than you can by not sanding it.

Q. Supposing you put on the service application of from seven to ten pounds of air for a distance of two hundred feet, I will ask you if it is not a fact that that would stop your engine and train going at the rate of six miles an hour, in two hundred feet, under the conditions described to you?

A. Eliminating the frosty rail?

Q. Yes? A. Yes.

With a frosty rail, I would say you could stop it by putting on a service application of ten pounds in going a distance of perhaps a hundred and fifty feet. If the rails were frosty and you put on a service [168] application of ten pounds, I would not wish to make a statement as to what distance it could be stopped in. I have seen trains stopped under similar conditions, but the distance varies so I couldn't tell in what distance it could be stopped. The distance varies at which a train may be stopped on a slippery rail. I can't say, exactly, in what distance I have seen it done. I have seen it done at various times during the winter season. I don't know as it

(Testimony of George T. Spaulding.)

was under the same conditions you have named in this case, with the same number of cars, but I have seen it under the same condition as to rail. If the rails were frosty, I would not want to give an estimate of the distance it could be stopped in.

Q. I am speaking now with a service application of ten pounds and with a frosty rail, you would not want to give an estimate—of the distance—it could be in, if you applied seventy pounds?

A. It would be impossible to apply seventy pounds.

You couldn't get over fifty pounds. It makes very little difference as to how many cars you have attached to your engine as to the distance you can stop it in. It would not make any difference whether you had five cars or twelve cars, or whether you had one car or twelve cars. The train could have been stopped in the same distance that you could have stopped [169] the engine with one car,—if the cars were uniformly loaded.

Mr. Furman asked me with reference to the efficiency of brakes on loaded cars,—he spoke of cars being loaded to the extent of one hundred thousand pounds. I don't know what these cars were loaded with on this particular morning.

Redirect Examination.

(By Mr. FURMAN.)

The WITNESS.—I know what the grade is approaching Montana street crossing from the east. It is three-quarters of one per cent.

(Testimony of George T. Spaulding.)

(By Mr. WHEELER.)

The WITNESS.—It would make a difference in the stopping of an engine or train if the grade was one-half of one per cent or three-quarters of one per cent. You could not stop as quickly on a three-quarters of one per cent grade as you could on a one-half of one per cent grade. As to the distance in number of feet, I could only guess at that; I would have to figure on it. I couldn't give it to you off hand.

Witness excused.

Defendants rest. [170]

[Testimony of W. J. McMaster, for Plaintiff (in Rebuttal).]

W. J. McMASTER, called in rebuttal, on behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. WHEELER.)

Q. Do you know what a retainer upon an engine is? A. Yes, I do.

Explain to the Court and jury what a retainer is.

Mr. FURMAN.—This is objected to as not proper redirect examination, and not rebuttal. If it is material for any purpose at all it should have been introduced upon his direct examination.

Objection overruled.

To which ruling of the Court counsel for defendants asked for and was allowed an exception.

A. A retainer is right on the end of a car on the brake, and I was sitting on the end of it; now, he claims he made this application; if he did I never

(Testimony of W. J. McMaster.)

heard him, or saw him.

I was sitting right below the brake and about two feet away from the retainer, and I was in a position where I would have been able to have heard the release of the air, if it had been released.

Q. If that service application had been made, and had been released, you would have heard it?

Mr. FURMAN.—This is objected to as not rebuttal. [171]

Objection overruled.

To which ruling of the Court counsel for defendants asked for and was allowed an exception.

A. I could have told it by the retainer if the application service had been made.

If the application service had been made I would have heard the noise. I heard the witnesses testify as to what point they put on the service application. I heard no noise of this application service, if they applied the application service. I heard the testimony with reference to the distance it was from the crossing when it was put on.

Q. What effect would the service application have upon the train, that is, as to the jar of the train, if any?

Mr. FURMAN.—I object to this question as calling for the conclusion of the witness, and as not proper rebuttal.

Objection overruled.

To which ruling of the Court counsel for defendants asked for and was allowed an exception.

A. It would slow it down, more than likely.

(Testimony of W. J. McMaster.)

Q. What have you to say with reference to whether it would cause any jar of the train?

A. Well, a kind of a shoving; that is the way it seems to me, when we would throw on the emergency the train [172] would jar. I think if he threw on the emergency I would feel the jar. I felt a movement in the train about five hundred feet from the crossing.

Cross-examination.

(By Mr. FURMAN.)

The WITNESS.—I was riding on the last car from the engine, on the east end of the car, the extreme east end. I was sitting sidewise on the car looking toward the south. I made a statement to Mr. Webb, the claim agent, after the accident happened on the 6th day of November, 1912. This is my signature attached to this statement. I made that statement in the freight-house.

Q. I will ask you whether you stated to Mr. Webb, at the freight-house, in Silver Bow County, Montana, on the 6th day of November, 1912, as follows: "I was on top of the train about three or four cars from the engine and Murphy was on the rear end of the train. I was sitting down on top of the car facing the south." A. No, I didn't make that statement.

Q. You didn't make that statement?

A. No, sir.

Mr. Murphy was not on the train at all, as a matter of fact.

(Testimony of W. J. McMaster.)

Redirect Examination.

(By Mr. WHEELER.) [173]

The WITNESS.—I noticed the condition of the rails that night with reference to whether or not they were *frost*. I didn't take particular notice, but I don't think they were frosty. I saw the rails, but I didn't notice any frost on them.

Witness excused.

[Testimony of E. S. Ramey, for Plaintiff (in Rebuttal).]

E. S. RAMEY, called in rebuttal on behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. WHEELER.)

The WITNESS.—Going at the rate of six miles an hour, frost on the rails would have some effect upon the distance in which you could stop a train. It would take a little longer to stop, probably a distance of about ten feet.

Witness excused.

Plaintiff rests. [174]

[Testimony of Ray Webb, for Defendants (in Rebuttal).]

RAY WEBB, called in rebuttal on behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. FURMAN.)

The WITNESS.—I have testified before in this case. I took the statement of Mr. W. J. McMasters in the freight-house of the Chicago, Milwaukee & St.

(Testimony of Ray Webb.)

Paul Railway Company on the 6th day of November, 1912. He there and then made the following statement to me and I put it down in writing and he signed it:

“I was on top of the train about three or four cars from the engine and Murphy was on the rear end of train. I was sitting down on top of the car facing the south.”

Cross-examination.

(By Mr. WHEELER.)

The WITNESS.—I put down the statement on the 6th day of November, the day after the accident. I don't know what day this was with reference to the date the inquest was held; this was soon after the accident. The coroner's inquest had not been held when I took the statement of the witnesses. My object was to find out just exactly how the accident happened as soon as I could.

Q. At the time you got this statement, Mr. McMasters [175] knew that Mr. Murphy was not on the train at all that night?

A. I didn't know it until I heard it testified to here.

I didn't know where he was on that night. I was told by all the men. I didn't get any statement from Mr. Murphy that night or the next day.

Witness excused.

Testimony closed.

The foregoing is all of the testimony offered and introduced upon the trial of the above-entitled action.

**[Motion for Order Directing Jury to Return Verdict
for Defendants, etc.]**

Mr. FURMAN.—Come now the defendants, at the conclusion of the taking of testimony in this cause, and after both parties have announced that they have concluded the taking of testimony, and move the Court for an order directing the jury to return a verdict in favor of the defendants, upon the following grounds and for the following reasons, to wit:

First: Upon the ground and for the reason that the complaint does not state a cause of action; the cause of action sought to be set up by the complaint, or within the complaint, being based upon the doctrine, of the last clear chance; and there is no allegation in the complaint of discovery, as required under the laws of the State of Montana.

Second: There has been a failure of proof upon the part of the plaintiff that, after plaintiff was discovered in a place of danger, that there was still time for the exercise of ordinary care to save plaintiffs intestate from damage.

Third: There is a total failure of proof upon the part of the plaintiff, or at best, a mere scintilla of evidence to the effect that plaintiff's intestate survived for any period, or at all, after the accident.
[177]

Fourth: On the ground and for the reason that the plaintiff's testimony shows clearly, without any contradiction, that the negligence of plaintiff's intestate was concurrent with the negligence of defendants, if the defendants were guilty of negligence

at all. It further shows clearly of plaintiff's intestate was active and continued right up to the very instant of the collision, or accident, which caused the death of plaintiff's intestate.

After argument by respective counsel the Court said:

The COURT.—The motion made by counsel for defendants at the close of court on yesterday is denied.

To which ruling of the Court in denying defendants motion for a directed verdict, counsel for defendants asked for and was allowed an exception. [178]

Thereupon, the jury, in charge of a sworn bailiff, retired to consider of their verdict; and, afterwards, on the 22d day of May 1914 the jury returned into court, with their verdict, signed by their foreman, which verdict is in words and figures as follows, to wit:

(Title of Court and Cause.)

Verdict.

“We, the jury in the above-entitled cause, find our verdict in favor of David Clement, as Administrator of the Estate of David Clement, Jr., deceased, and against the defendants and we assess the damages of the plaintiff at the sum of \$7500.00—Seven Thousand & Five Hundred Dollars.

“PARKER RAND,

“Foreman.” [179]

To which verdict defendants then and there duly excepted.

That thereafter, on the 22d day of May, 1914, the said verdict was filed by the clerk of said court in said cause; and thereupon the said jury were discharged from further consideration of the case.

Thereafter, on May 28, 1914, the Court entered judgment on the verdict in favor of the plaintiff; to which order the Court and the judgment entered thereon counsel for defendants then and there duly excepted.

That, on the 23d day of May, 1914, the Court granted the defendants thirty days in addition to the statutory time within which to prepare and serve proposed draft of bill of exceptions in said cause.

WHEREFORE, the defendants above named pray the Court that the foregoing bill of exceptions may be settled and allowed as and for a bill of exceptions, showing all the evidence given on the said trial and the proceedings had therein.

B. K. WHEELER,

H. G. MURPHY,

Attorneys for Defendants. [180]

[Admission of Service of Bill of Exceptions.]

Service of the above and foregoing Bill of Exceptions accepted, and copy thereof received, this 19th day of June, A. D. 1914.

B. K. WHEELER,

B. K. WHEELER,

Attorneys for Plaintiff.

[Order Settling Bill of Exceptions, etc.]

I hereby certify that the above and foregoing Bill of Exceptions is a true and correct bill of exceptions;

156 *Chicago, Milwaukee & St. Paul Ry. Co. et al.*

and order that the same be signed, settled, allowed, and filed, this 19 day of October, 1914.

GEO. M. BOURQUIN,
Judge.

Filed Feb. 3d, 1915. Geo. W. Sproule, Clerk.
[181]

That on January 23, 1915, an Assignment of Errors was duly filed herein, in the words and figures following, to wit: [182]

*In the District Court of the United States, for the
District of Montana.*

No. 124.

DAVID CLEMENT, as Administrator of the Estate
of DAVID CLEMENT, Jr., Deceased,
Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL
RAILWAY COMPANY, a Corporation;
CHICAGO, MILWAUKEE & PUGET
SOUND RAILWAY COMPANY, a Cor-
poration; J. E. WOODS, and M. I. CHAP-
PELL,

Defendants.

Assignment of Errors.

Plaintiffs in error, defendants above named, in connection with their petition for writ of error herein, specify the following particulars wherein error was committed in this said cause:

I.

ERRORS OF LAW.

1. The Court erred in overruling defendants' separate demurrers, for the reason that

a. The complaint fails to allege discovery by the defendants, or any of them, of plaintiff's intestate in a place of peril.

b. It is evident from the complaint that plaintiff's intestate drove upon the defendant corporations' railroad track into a place of danger, without looking or listening. [183]

2. The Court erred in denying defendants' motion for a directed verdict, made on their behalf at the conclusion of the taking of testimony, for the reason that

a. Plaintiff failed to prove that David Clement, Jr., survived the accident for an appreciable time.

b. It appeared from the evidence that plaintiff's intestate was never discovered by the defendants, or any of them, in a place of peril.

c. It appeared from the evidence that the death of plaintiff's intestate was instantaneous.

d. It appeared from the evidence that the negligence of plaintiff's intestate was continuing until the very instant of accident.

3. The Court erred in entering judgment upon the verdict for the plaintiff, for the reason that

a. The evidence is not sufficient to support a verdict, for the reason that

(1) Under the pleadings the plaintiff relies on the doctrine of the last clear chance, and fails to prove discovery.

(2) The evidence does not show survival after the accident.

(3) The evidence affirmatively shows instantaneous death of plaintiff's intestate.

(4) The evidence conclusively shows concurrent negligence on the part of plaintiff's intestate.

II.

ERRORS RELATING TO THE ADMISSION AND REJECTION OF TESTIMONY.

1. The Court erred in overruling defendants' objection to the question asked of plaintiff's witness Willoughby, on direct examination, in the following respect:

“Q. Did you examine the track for the purpose of [184] ascertaining whether or not there was any blood, or anything else on the track?

“Mr. FURMAN.—I object to this question as leading, and also suggestive.

“Mr. WHEELER.—This is for the purpose of fixing the place, as near as he can, where the body first struck the track.

“Objection overruled.

“To which ruling of the Court counsel for defendants then and there took and was allowed an exception.

“Q. Go ahead now and state—where would you say that was with reference to being west of the crossing?

“A. Where the body laid?

“Q. Yes, where the body laid.

“A. Around seventy-five feet, maybe more.

“Q. Well, I am asking you where the point was that you first found any blood on the rail, or on the tracks?

“A. Probably halfway from where the body was lying to Montana Street.”

2. The Court erred in overruling defendants’ objection to the question asked of plaintiff’s witness Glover, on direct examination, in the following respect:

“Q. Do you know what common laborers got in this community, when they worked on the service?

“Mr. FURMAN.—We object to this as incompetent, irrelevant, and immaterial. He can testify what this boy was actually getting, but not what other laborers got.

“Objection overruled.

“To which ruling of the Court counsel for defendants then and there took and was allowed an exception.

“Well, laborers received from \$3.00 to four dollars per day.

“They received from three to four dollars a day for [185] surface work and three dollars and half per day for miners.”

3. The Court erred in sustaining plaintiff’s objection to the question asked of the witness Glover, on cross-examination, in the following respect:

“Q. Did he have anything coming at the time of his death?

“Mr. WHEELER.—This is objected to as in-

competent, irrelevant and immaterial and as not proper cross-examination.

“Objection sustained.

“To which ruling of the Court counsel for defendants then and there took and was allowed an exception.”

4. The Court erred in overruling defendants’ objection to the question asked of plaintiff’s witness Glover, on redirect examination, in the following respect:

“Q. For what distance was Montana Street torn up south of the crossing?

“Mr. FURMAN.—I object to this as incompetent, irrelevant and immaterial.

“Objection overruled.

“To which ruling of the Court counsel for defendants then and there took and was allowed an exception.

“A. It was torn up over a distance of probably two hundred feet from the track to a point about ten hundred feet west of Montana Street going toward the ranch, that is south, on the side of the cemetery.”

5. The Court erred in overruling defendants’ objection to the question asked of plaintiff’s witness M. I. Chappell, on direct examination, in the following respect: [186]

“Q. Was there any flagman at the crossing?

“Mr. FURMAN.—We object to this question as incompetent, irrelevant and immaterial, no damage being predicated upon, or based upon, the failure to maintain lights, or to maintain a

flagman at this crossing.

“THE COURT.—The objection is overruled. It might make a difference in the degree of care, or diligence, on the part of the engineer to exercise. If there was a flagman there, the engineer might rely, to some extent, on him, but if there was none there, and he knew it it might require more diligence on his part.

“To which ruling of the Court counsel for defendants then and there took and was allowed an exception.

“There was not.”

6. The Court erred in overruling defendants’ objection to the question asked of plaintiff’s witness M. I. Chappell, on direct examination, in the following respect:

“Q. What did you notice with reference to any movements of any part of the body?

“Mr. FURMAN.—We object to this as leading and suggestive.

“Objection overruled.

“To which ruling of the Court counsel for defendants then and there took and was allowed an exception.

“A. Merely gasping a little, frothing at the mouth, as if in his last struggles for life; I considered him to be beyond all human aid at the time.”

7. The Court erred in overruling the following objections of defendants to the questions asked of plaintiff’s witness M. I. Chappell, on direct examination, in the following [187] respects:

“Q. State whether or not you noticed any blood or anything else upon the rails of the track prior to the time you saw the body east of a point where you found the body.

“Mr. FURMAN.—This is objected to as leading and also suggestive.

“Objection overruled.

“To which ruling of the Court counsel for defendants asked for and allowed an exception.

“A. I don't quite understand your question.

“Q. Well, was there anything found by you with reference to parts of the body east of the place where you found the body itself, the main portion of the body?

“A. Before making my first examination of the body, do you mean?

“Q. At any time.

“A. I saw that afterward, yes.

“Q. What did you find there?

“A. His hand was picked up about, I should judge, ten feet east of the body, picked up by the assistant undertaker; I was with him at the time.

“There was nothing else that I could call to mind that was found there.

“Q. Was there any blood or anything of that kind?

“Mr. FURMAN.—I object to this as leading and suggestive.

“Objection overruled.

“To which ruling of the Court counsel for de-

fendants asked for and was allowed an exception.

“Q. About how far east of the body was it that [188] you found the blood?

“Mr. FURMAN.—I object to this as leading and also a repetition.

“Objection overruled.

“To which ruling of the Court counsel for defendants asked for and was allowed an exception.

“A. If I remember rightly it was between where the hand was picked up and the location of the body.

8. The Court erred in overruling the defendants' objection to the question asked of plaintiff's witness M. I. Chappell, on direct examination, in the following respect:

“Q. What have you to say as to whether or not it should be rung continuously?

“Mr. FURMAN.—This is objected to as leading and suggestive.

“Objection overruled.

“To which ruling of the Court counsel for defendants asked for and was allowed an exception.

“A. The rule calls for the bell to be rung upon approaching all crossings at grade, and continuously rung until the crossing is passed.”

9. The Court erred in denying defendants' motion to strike out the testimony of the plaintiff's witness M. I. Chappell given on his cross-examination, in the following respect:

“Mr. FURMAN.—I move to strike out the testimony of the witness with reference to this, as to the manner of how the wagon slid along the rails, for the reason that it is a conclusion and not a statement of any physical fact.” [189].

“By Mr. WHEELER.—When the engine first struck the wagon you saw it then?

“A. Yes, sir.

“Q. And you saw it for how long a distance after that?

“A. I didn’t see it after that until after it stopped and I went to the rear end of the engine.

“Q. Was the wagon upset?

“A. No, sir, only partially.

“Motion to strike denied.

“To which ruling of the Court counsel for defendants asked for and was allowed an exception.

10. The Court erred in overruling defendants’ objection to the following question asked of the defendants’ witness J. E. Woods, on cross-examination, in the following respect:

“Q. What have you to say with reference to whether or not you used any sand, or whether there was any sand on the engine that morning?

“Mr. FURMAN.—I object to this for the reason that there is no defective appliance *complained on* the part of the plaintiff, and no negligence in not applying sand upon the tracks, and no defects in the appliances on the engine.

“Objection overruled.

“To which ruling of the Court counsel for defendants asked for and was allowed an exception.” [190]

WHEREFORE, defendants above named pray that the petition for writ of error be granted; and that, for the reasons aforesaid, and for divers and sundry other reasons the judgment entered herein on the 28th day of May, 1914,—which said judgment was suspended by the filing of defendants’ petition for new trial on the 19th day of June, 1914, and re-entered by the order denying a new trial made and entered on the 5th day of December, 1914,—be reversed.

GEORGE F. SHELTON,
FRED J. FURMAN,
A. J. VERHEYEN,

Attorneys for Defendants, Plaintiffs in Error.

Filed Jan. 23, 1915. Geo. W. Sproule, Clerk.
[191]

That on January 23, 1915, Petition for Writ of Error was duly filed herein, in the words and figures following, to wit: [192]

*In the District Court of the United States, for the
District of Montana.*

No. 124.

DAVID CLEMENT, as Administrator of the Estate
of DAVID CLEMENT, Jr., Deceased,
Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAIL-
WAY COMPANY, a Corporation; CHI-
CAGO, MILWAUKEE & PUGET SOUND
RAILWAY COMPANY, a Corporation; J.
E. WOODS, and M. I. CHAPPELL,
Defendants.

Petition for Writ of Error.

Now come Chicago, Milwaukee & St. Paul Rail-
way Company, a corporation; Chicago, Milwaukee
& Puget Sound Railway Company, a corporation;
J. E. Woods, and M. I. Chappell, defendants herein;
and say:

That on or about the 28th day of May, A. D. 1914,
this Court entered judgment herein in favor of the
plaintiff and against these defendants, in which said
judgment and the proceedings had prior thereunto
in this said cause, certain manifest errors have in-
tervened and were committed, to the great prejudice
of these said defendants,—all of which will in more

detail appear from the Assignment of Errors filed with this petition.

WHEREFORE, defendants, feeling themselves aggrieved by the said judgment, come now and pray the Court for an order allowing the said defendants to prosecute a writ of error to the Honorable, the United States Circuit Court of [193] Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided for the correction of the errors so complained of; that an order be made fixing the amount of supersedeas bond in this said case; and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

And the said defendants herewith submit their assignment of errors in accordance with the rules of the United States Circuit Court of Appeals and the course and practice of this Honorable Court.

And your petitioners will ever pray.

GEORGE F. SHELTON,

FRED J. FURMAN,

A. J. VERHEYEN,

Attorneys for Defendants.

Filed Jan. 23, 1915. Geo. W. Sproule, Clerk.
[194]

Thereafter, on January 23, 1915, Order Allowing Writ of Error was duly made and entered herein, in the words and figures following, to wit: [195]

*In the District Court of the United States, for the
District of Montana.*

No. 124.

DAVID CLEMENT, as Administrator of the Estate
of DAVID CLEMENT, Jr., Deceased,
Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAIL-
WAY COMPANY, a Corporation; CHI-
CAGO, MILWAUKEE & PUGET SOUND
RAILWAY COMPANY, a Corporation; J.
E. WOODS, and M. I. CHAPPELL,
Defendants.

Order Allowing Writ of Error.

On this 23 day of January, A. D. 1915, came the defendants herein, by their attorneys, and filed herein and presented to the Court their petition praying for the allowance of a writ of error, together with an assignment of errors intended to be urged by them; praying also that an order be made fixing a supersedeas bond; and praying also that a transcript of the record, proceedings, and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises;

On consideration whereof, the Court does allow the writ of error upon the said defendants' giving bond according [196] to law in the sum of Eighty-five Hundred Dollars (\$8500.00).

GEO. M. BOURQUIN,
Judge of the District Court of the United States, for
the District of Montana.

Filed and entered Jan. 23, 1915. Geo. W.
Sproule, Clerk. [197]

Thereafter, on January 25, 1915, Bond on Writ of Error was duly filed herein, in the words and figures following, to wit: [198]

*In the District Court of the United States, for the
District of Montana.*

No. 124.

DAVID CLEMENT, as Administrator of the Estate
of DAVID CLEMENT, Jr., Deceased,
Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAIL-
WAY COMPANY, a Corporation, CHI-
CAGO, MILWAUKEE & PUGET SOUND
RAILWAY COMPANY, a Corporation, J. E.
WOODS, and M. I. CHAPPELL,
Defendants.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS:
That we, Alex. J. Johnston and J. K. Heslet, as sure-
ties are held and firmly bound unto plaintiff, David

Clement, as administrator of the estate of David Clement, Jr., deceased, in the full and just sum of Three Hundred Dollars (\$300.00), to be paid to the said David Clement, administrator, his executors, administrators and assigns; to which payment well and truly to be made, we do hereby bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this 25th day of January, A. D. 1915.

WHEREAS, lately, at a District Court of the United States, for the District of Montana, in a suit pending in the said court, between the said David Clement, Administrator of the Estate of David Clement, Jr., deceased, plaintiff, [199] and the said Chicago, Milwaukee & St. Paul Railway Company (a corporation), Chicago, Milwaukee & Puget Sound Railway Company (a corporation), J. E. Woods and M. I. Chappell, Defendants, a judgment was rendered against the said defendants; and the said defendants, having thereafter obtained a writ of error, and filed a copy thereof in the clerk's office of the said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said David Clement, Administrator, citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the City of San Francisco, in the State of California, on the 22 day of February, 1915, next:

NOW, THEREFORE, the condition of the foregoing obligation is such that if the said defendants shall prosecute the said writ of error to effect, and

answer all damages and costs if they fail to make their plea good, then this obligation shall be void; otherwise to remain in full force and virtue.

ALEX J. JOHNSTON.

J. K. HESLET.

United States of America,
State and District of Montana,
County of Silver Bow,—ss.

Alex. J. Johnston and J. K. Haslet, being severally duly sworn, on oath, each for himself, says: That he is one of the sureties who subscribed the above and foregoing bond; that he is a resident and householder within the city of Butte, County of Silver Bow, State of Montana, and is worth the sum mentioned in the said undertaking, over and above all his just debts and liabilities, exclusive of property exempt from execution.

ALEX J. JOHNSTON,

J. K. HESLET.

Subscribed and sworn to before me this 25th
[200] day of January, A. D. 1915.

[Seal]

A. J. VERHEYEN,

Notary Public for the State of Montana, Residing at
Butte, Montana.

My commission expires Jan. 23, 1918.

Approved by:

_____,
United States District Judge for the District of
Montana.

Filed Jan. 25, 1915. Geo. W. Sproule, Clerk.
[201]

Thereafter, on January 25, 1915, a Supersedeas Bond on Writ of Error was duly filed herein, in the words and figures following, to wit: [202]

*In the District Court of the United States, for the
District of Montana.*

No. 124.

DAVID CLEMENT, as Administrator of the Estate
of DAVID CLEMENT, Jr., Deceased,
Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAIL-
WAY COMPANY, a Corporation, CHI-
CAGO, MILWAUKEE & PUGET SOUND
RAILWAY COMPANY, a Corporation, J. E.
WOODS, and M. I. CHAPPELL,
Defendants.

Supersedeas Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS:
That we, Chicago, Milwaukee & St. Paul Railway
Company (a corporation), Chicago, Milwaukee &
Puget Sound Railway Company (a corporation), J.
E. Woods, and M. I. Chappell as principals, and Alex.
J. Johnston and J. K. Heslet, as sureties, are held and
firmly bound unto David Clement, Administrator of
the Estate of David Clement, Jr., deceased, plaintiff
above named, in the full and just sum of Eighty-five
Hundred Dollars (\$8500.00), to be paid to the said
David Clement, Administrator, plaintiff, as afore-
said, his certain attorneys, executors, administrators,
or assigns; to which payment, well and truly to be

made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally by these presents. [203]

Sealed with our seals, and dated this 25th day of January, A. D. 1915.

WHEREAS, lately, at a District Court of the United States, for the District of Montana, in a suit pending in the said court, between the said David Clement administrator of the Estate of David Clement, Jr., deceased, plaintiff, and the said Chicago, Milwaukee & St. Paul Railway Company (a corporation), Chicago, Milwaukee & Puget Sound Railway Company (a corporation), J. E. Woods, and M. I. Chappell, defendants, a judgment was rendered against the said defendants; and the said defendants, having thereafter obtained a writ of error, and filed a copy thereof in the clerk's office of said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said David Clement, administrator, citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, on the 22d day of February, next:

NOW, THEREFORE, the condition of the foregoing obligation is such that if the said defendants shall prosecute the said writ of error to effect, and answer all damages and costs if they fail to make their plea good, then this obligation shall be void;

otherwise to remain in full force and virtue.

CHICAGO, MILWAUKEE & ST. PAUL
RAILWAY COMPANY,

CHICAGO, MILWAUKEE & PUGET
SOUND RAILWAY COMPANY,

J. E. WOODS,

M. I. CHAPPELL,

By FRED J. FURMAN,

Their Attorney. [204]

ALEX J. JOHNSTON,

J. K. HESLET.

United States of America,

State and District of Montana,

County of Silver Bow,—ss.

Alex J. Johnston and J. K. Heslet, being severally duly sworn, on oath, each for himself says: That he is one of the sureties who subscribed the above and foregoing bond; that he is a resident and householder within the city of Butte, county of Silver Bow, State of Montana, and is worth the sum mentioned in the said undertaking, over and above all his just debts and liabilities, exclusive of property exempt from execution.

ALEX J. JOHNSTON,

J. K. HESLET.

Subscribed and sworn to before me this 25th day of January, 1915.

[Seal] A. J. VERHEYEN,
Notary Public for the State of Montana, Residing
at Butte, Montana.

My Commission expires Jan. 23, 1918.

Approved by:

_____,
United States District Judge for the District of
Montana.

Filed Jan. 25, 1915. Geo. W. Sproule, Clerk.
[205]

That on January 23, 1915, a Writ of Error was
duly issued herein, which said Writ of Error is
hereto annexed and is in the words and figures fol-
lowing, to wit: [206]

*In the United States Circuit Court of Appeals, in and
for the Ninth Circuit.*

Writ of Error.

United States of America,
District of Montana,—ss.

The President of the United States, to the Honorable
the District Court of the United States for the
District of Montana, Greeting:

Because in the record and proceedings, as also in
the rendition of the judgment, of a plea which is in
said District Court before you, between David Cle-
ment, as administrator of the Estate of David
Clement, Jr., deceased, plaintiff, and Chicago, Mil-
waukee & St. Paul Railway Company (a corpora-

tion), Chicago, Milwaukee & Puget Sound Railway Company (a corporation), J. E. Woods, and M. I. Chappell, defendants, a manifest error hath happened, to the great damage of the said defendants, as by their petition and assignment of errors appears, we, being willing that error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same in the United States Circuit Court of Appeals for [207] the Ninth Circuit, at San Francisco, California, in said Circuit, on the 22 day of Feb., 1915, next, within thirty (30) days hereof, to be then and there held, that, the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals for the Ninth Circuit may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

WITNESS the Hon. EDWARD DOUGLASS WHITE, Chief Justice of the United States, and the seal of the said District Court of the United States for the District of Montana, this 23d day of January, A. D. 1915, and in the one hundred and thirty-ninth

year of the Independence of the United States of America.

[Seal]

GEO. W. SPROULE,
Clerk of the District Court of the United States, for
the District of Montana.

By Harry H. Walker,
Deputy Clerk.

Allowed by:

GEO. M. BOURQUIN,
United States District Judge, for the District of
Montana.

Service of the above and foregoing Writ of Error
is hereby admitted, and receipt of copy thereof ac-
knowledged, this 25th day of January, A. D. 1915.

B. K. WHEELER,
HOMER G. MURPHY,

J. A.

Attorneys for Plaintiff in Said District Court of the
United States for the District of Montana, De-
fendant in Error. [208]

ANSWER OF COURT TO WRIT OF ERROR.

The answer of the Honorable, the District Judge
of the United States for the District of Montana, to
the foregoing Writ:

The record and proceedings whereof mention is
within made, with all things touching the same, I cer-
tify, under the seal of the said District Court of the
United States, to the United States Circuit Court
of Appeals for the Ninth Circuit, within mentioned,
at the day and place within contained, in a certain

schedule to this writ annexed, as within I am commanded.

By the Court.

[Seal]

GEO. W. SPROULE,
Clerk. [209]

[Endorsed]: No. 124. In the District Court of the United States, for the District of Montana. David Clement, as Administrator of the Estate of David Clement, Jr., Deceased, Plaintiff, vs. Chicago, Milwaukee & St. Paul Railway Company et al., Defendants. Writ of Error. Filed Jan. 25, 1915. Geo. W. Sproule, Clerk. By Harry H. Walker, Deputy Clerk. [210]

Thereafter, on January 23, 1915, a Citation was duly issued herein, which said Citation is hereto annexed and is in the words and figures following, to wit: [211].

In the United States Circuit Court of Appeals, in and for the Ninth Circuit.

Citation on Writ of Error.

United States of America,
District of Montana,—ss.

The President of the United States, to David Clement, as Administrator of the Estate of David Clement, Jr., Deceased, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the City of San Francisco, California, on the 22 day of Feb., 1915, next, pursuant to a writ of error

filed in the Clerk's Office of the District Court of the United States for the District of Montana, wherein Chicago, Milwaukee & St. Paul Railway Company (a corporation), Chicago, Milwaukee & Puget Sound Railway Company (a corporation), J. E. Woods, and M. I. Chappell, defendants in said District Court, are plaintiffs in error, and you, the said David Clement, as administrator of the Estate of David Clement, Jr., deceased, plaintiff in said District Court, are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the Hon. GEORGE M. BOURQUIN, United States District Judge, for the District of Montana, this 23 day of Jan., A. D. 1915.

GEO. M. BOURQUIN,
United States District Judge for the District of
Montana. [212]

Due personal service of the foregoing Citation made and admitted, and receipt of copy acknowledged, this 25th day of January, A. D. 1915.

B. K. WHEELER,
HOMER G. MURPHY,

J. A.

Attorneys for Plaintiff in Said District Court and
Defendant in Error. [213]

[Endorsed]: No. 124. In the District Court of the United States, for the District of Montana. David Clement, as Administrator of the Estate of David Clement, Jr., Deceased, Plaintiff, vs. Chicago, Mil-

waukee & St. Paul Railway Company et al., Defendants. Citation on Writ of Error. Filed Jan. 25, 1915. Geo. W. Sproule, Clerk. By Harry H. Walker, Deputy Clerk. [214]

Praecipe [for Transcript of Record].

Thereafter, on February 3, 1915, a Praecipe for Transcript was duly filed herein, in the words and figures following, to wit:

*In the District Court of the United States, District
of Montana.*

No. 124.

DAVID CLEMENT, Admr., etc.,

Plaintiff,

vs.

C. M. & ST. PAUL RY. CO., a Corp., et al.,

Defendants.

The Clerk of said Court will please insert the following in Transcript on Appeal: Amended Complaint, Subpoena, Separate Demurrers of Ry. Co., Chappel and Woods, Answer to Am. Complaint, Verdict, Judgment, (Petition for New Trial), (Bill of Exceptions), Opinion and Order of Court Denying New Trial, Pet. for Writ of Error, Order Allowing Writ of Error, Writ of Error, Assignments of Error, Citation on Writ of Error, Supersedeas Bond on Writ of Error and Bond on Writ of Error.

Dated Feb. 1, 1915.

SHELTON & FURMAN,

A. J. VERHEYEN,

Attorneys for Defendants.

Filed Feb. 3, 1915. Geo. W. Sproule, Clerk.
[215]

**Certificate of Clerk U. S. District Court to Transcript
of Record.**

United States of America,
District of Montana,—ss.

I, Geo. W. Sproule, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 216 pages, numbered consecutively from 1 to 216, inclusive, is a full, true and correct transcript of all things mentioned in the praecipe for transcript herein, copy of which is included in said transcript, except the subpoena, which is not of record in said court, as appears from the original files and records of said court in my custody as such clerk; and I further certify and return that I have annexed to said transcript and included within said paging the original writ of error and citation issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of Thirty-three 85/100 Dollars (\$33.85/100), and have been paid by the plaintiff in error.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court at Helena, Montana, this 13th day of February, A. D. 1915.

[Seal]

GEO. W. SPROULE,
Clerk.

[Ten Cents Internal Revenue Stamp. Canceled
February 13, 1915. G. W. S.] [216]

[Endorsed]: No. 2570. United States Circuit Court of Appeals for the Ninth Circuit. Chicago, Milwaukee & St. Paul Railway Company, a Corporation, Chicago, Milwaukee & Puget Sound Railway Company, a Corporation, J. E. Woods and M. I. Chappell, Plaintiffs in Error, vs. David Clement, as Administrator of the Estate of David Clement, Jr., Deceased, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Montana.

Filed February 16, 1915.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

No. 2570

United States
Circuit Court of Appeals
For the Ninth Circuit

CHICAGO, MILWAUKEE & ST. PAUL
RAILWAY COMPANY, a corporation;
CHICAGO, MILWAUKEE & PUGET
SOUND RAILWAY COMPANY, a cor-
poration; J. E. WOODS, and M. I.
CHAPPELL,

Plaintiffs in Error,

v.

DAVID CLEMENT, as Administrator of
the Estate of DAVID CLEMENT, Jr., De-
ceased,

Defendant in Error.

Brief of Plaintiffs' in Error

Upon Writ of Error to the United States District Court of
the District of Montana

GEORGE F. SHELTON,
FRED J. FURMAN,
A. J. VERHEYEN,

Counsel for Plaintiffs in Error.

Filed.....

.....**Filed** Clerk.



BUTTE MINER CO., PRINTERS

APR 27 1915

F. D. Monckton,
Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit

CHICAGO, MILWAUKEE & ST. PAUL
RAILWAY COMPANY, a corporation;
CHICAGO, MILWAUKEE & PUGET
SOUND RAILWAY COMPANY, a cor-
poration; J. E. WOODS, and M. I.
CHAPPELL,

Plaintiffs in Error,

v.

DAVID CLEMENT, as Administrator of
the Estate of DAVID CLEMENT, Jr., De-
ceased,

Defendant in Error.

Brief of Plaintiffs in Error

STATEMENT OF THE CASE.

A.—THE PLEADINGS.

David Clement, Jr., was killed while driving a loaded and closed milk wagon, with a glass front and side door, northward on Montana street in the City of Butte, by a

collision with a Chicago, Milwaukee & Puget Sound Railway Company train. David Clement thereafter was duly and regularly appointed and qualified as administrator of his estate, and brought this suit on behalf of the said estate.

The gravamen of the complaint is contained in paragraph VI. thereof. (Tr., p. 4 line 11 *et seq.*)

It is admitted that on the morning of the 5th of November, 1912, at about four o'clock, David Clement, Jr., was driving a pair of horses attached to an enclosed milk wagon, going northerly on Montana Street, a public thoroughfare in Butte, toward and near the Milwaukee crossing; that Woods was engineer, and Chappell was foreman of the switching crew; that the gates were not lowered at that crossing; and that David Clement, Jr., at that time and place, was killed in a collision. (Tr., p. 14, paragraph III.)

The other allegations of this paragraph (VI.), which, being denied, join issue, are substantially to the effect that David Clement, Jr., was not observant of the approach of this train from the east; that he was directly within the way of the approaching train; that the said Woods and the said Chappell did see, or by the exercise of ordinary care could have seen, him coming directly in the path of the engine; and that they did see, or by the exercise of reasonable care could have seen, that the said David Clement, Jr., was in danger of being struck by the engine, and that he was unobservant of the approach of the engine; and that, after so seeing him in danger, they negligently and carelessly drove their engine against the vehicle in which he was, without giving him warning or lowering the

gates; and that, by reason of the negligent management and operation of the engine, the Clement boy was crushed, maimed and killed.

Subsequent to the 5th of November, 1912, and prior to the commencement of the suit, the Puget Sound Company transferred by deed all of its property in Montana and elsewhere to the St. Paul Company; and the latter company assumed all of the obligations and liabilities of the former. Service was not had upon the Puget Sound Company; and that company made no appearance. The other defendants appeared separately by general demurrer. (Tr., pages 8-12.) These demurrers were, by the consent of counsel, overruled; and thereafter the defendants answered jointly. The answer is, in form, a general denial of all the alleged negligent acts of the defendants, and each of them.

The cause was tried before the court and a jury; and, after the submission of evidence, arguments by counsel, and the charge of the court, the jury retired, to bring in a verdict against plaintiff's in error in the sum of \$7,500. (Tr., p. 16.)

Judgment was entered upon this verdict on May 28, 1914 (Tr., pages 17-18). A petition for new trial was duly filed on the 19th of June, 1914 (Tr., pages 19-21). This motion for new trial was denied in the memorandum opinion and order of the court handed down on the 5th day of December, 1914 (Tr., pages 22-25, incl.). A bill of exceptions having been duly signed, settled, and allowed (Tr., p. 26 *et seq.*), an assignment of errors (Tr., p. 156) and petition for writ of error (Tr., p. 166) having been duly filed, and

an order allowing said writ of error to issue having been duly given and made (Tr., p. 168), thereafter and in due time, and in the manner prescribed by law and the rules of this Honorable Court, this appeal has been perfected; and the writ of error brings the judgment of the United States District Court for the District of Montana entered upon the jury's verdict in favor of the plaintiff and against the defendants before your Honors for review.

B—THE EVIDENCE.

Much of the evidence introduced on behalf of the parties is in harmony. It is agreed that on the morning of the fatality Engineer Woods was moving a train of twelve cars loaded with coal and coke, of a total weight of about seven hundred and fifty tons, to the B., A. & P. Ry. transfer; that his train was being drawn by an engine so constructed that it could move with equal facility either forward or backward, and that there was a coal oil lamp at each end. This morning the engine was backing, drawing the train to the west, and Chappell was standing on the footboard on the south side of the engine, at the extreme west end; that some four or five hundred feet east of the crossing, the train came around a curve at a speed of about eight miles per hour. Shortly thereafter some breaking power was applied, and the speed of the train somewhat checked. Chappell says he observed the milk wagon approaching the track when he was about three hundred and thirty or three hundred and forty feet east from the crossing. The milk wagon was then one hundred and forty or one hundred and forty-five feet south of the crossing. The team and the

wagon were then going at the rate of four or five miles per hour. He watched the wagon until the train was perhaps two hundred feet from the crossing, and then gave a "slow" signal. He jumped from the train just as the horses' heads were coming on the track over the south rail. The train was then going about six miles per hour. (Tr., pages 49-50.) The lines on the horses' backs were slack when he got into a place where he could see them. (Tr., p. 55, line 6.) He watched continuously the approach of the team from the time he first saw it; and no effort was made on the part of the driver of the team to check or stop from the time he first saw it. There was no evidence of fright of the team whatever. The team gave no evidence of alarm. Its approach was uniform. He saw no driver or indication of any driver on the wagon. (Tr., p. 61, line 26, to p. 62, line 10.) Again, he says (Tr., p. 62, line 18), "The lines were slack, and there was no evidence of the driver." He stayed on the footboard until the horses' heads were on the south rail, and then, to save himself, got off. The accident happened almost immediately afterward. (Tr., p. 64, line 25, to p. 65, line 5.)

Engineer Woods testified that he saw the rig when it was about one hundred and seventy feet south of the crossing. The team was going about five miles an hour, and showed no symptoms of nervousness. When he got up where he could see, he noticed that the lines upon the horses' backs were slack (Tr., p. 106, line 24, to Tr., p. 107, line 20.) He saw the boy at no time at all before the accident. There was no indication that there was any driver in the rig.

Of these matters, there is no contradiction. It also

stands uncontradicted in the record that the injuries suffered were most grewsome. The top of the head from the bridge of the nose was completely crushed, the left arm cut off between the elbow and the shoulder, the left leg cut off at the knee, and the right leg at the shoe top. Otherwise, there was no scratch on the body. (Tr., p. 98, lines 12 to 22.)

There is no contradiction of the further testimony that approximately seventy-five feet west of the crossing were found flesh, bones, and brains scattered on Montana Street.

No one saw David Clement, Jr., until after the accident, when he was discovered beneath the train.

Of the other issues raised by the pleadings, there is much conflict of evidence. There is a conflict respecting the giving of the signals. Generally speaking, plaintiff's witnesses testified that there was a failure to give proper signals; defendants' witnesses testified that all proper signals were given. Plaintiff's witnesses testified that, under given circumstances, after Woods made the emergency application of the brakes east of the crossing the train should have been brought to a standstill in a distance of from about fifteen to a little more than thirty feet; witnesses for the defense testified that, under the circumstances, the stop was as good as could be expected.

No one, except Chappell, testified at all that there was any evidence of life after David Clement, Jr., was discovered under the train. With respect to the testimony given by Chappell, we respectfully direct your Honors' attention to the Memorandum Opinion filed by the Hon-

orable Judge of the District Court for the District of Montana (Tr., pages 22-25). Passing on the weight to be given to Chappell's testimony, the trial judge says that that worthy was foresworn, that his testimony was calculated to meet the requirements of some authorities. His Honor says that it is a daring proposition for plaintiff's counsel to argue that the question of his credibility was for the jury; and, if the verdict depended in any degree upon the witness's testimony, a new trial ought to be and would be granted. (Tr., p. 23, line 24.) The trial court says clearly and specifically that David Clement, Jr., was dead when found. (Tr., p. 23, line 18.) There being no conflict of evidence at all on the propositions that David Clement, Jr., was dead when found; that he was never seen until after the accident, and, when seen, was dead; that from the time the milk wagon first came into sight until the time of the collision, the horses never slackened speed, the lines were not drawn tight, and no effort made to check the team—it makes no difference, according to the contentions of plaintiffs in error, at what point the alarms were sounded or where the emergency application of the brakes was made; because, irrespective of all other considerations, the plaintiff in this suit cannot prevail, because (1) there is no proof of the survival of David Clement, Jr., and (2) because the evidence makes it clear that David Clement, Jr., was guilty of concurrent negligence, which precluded recovery by his estate. In addition to these two propositions, the plaintiff's in error respectfully urge it upon the attention of this Honorable Court that the complaint fails to state a cause of action, and that reversible error occurred

in overruling objections to leading questions asked by plaintiff's counsel of his witnesses.

II.

SPECIFICATION OF ERRORS.

1. The court erred in overruling defendants' separate demurrers. (Tr., pages 8-10.)

2. The court erred in denying defendants' motion for a directed verdict made on their behalf at the conclusion of the taking of testimony. (Tr., p. 153.)

3. The court erred in entering judgment upon the verdict for the plaintiff. (Tr., p. 17.)

4. The court erred in overruling defendants' objection to the question of plaintiff's witness Willoughby, on direct examination, in the following respect:

“Q. Did you examine the track for the purpose of ascertaining whether or not there was any blood, or anything else on the track?

“MR. FURMAN. I object to this question as leading, and also suggestive.

“MR. WHEELER. This is for the purpose of fixing the place, as near as he can, where the body first struck the track.

“Objection overruled.

“To which ruling of the Court counsel for defendants then and there took and was allowed an exception.”

(Tr., p. 158.)

5. The Court erred in overruling defendants' objection to the question asked of plaintiff's witness M. I. Chappell, on direct examination, in the following respect:

“Q. What did you notice with reference to any movements of any part of the body?

“MR. FURMAN. We object to this as leading and suggestive.

“Objection overruled.

“To which ruling of the Court counsel for defendants then and there took and was allowed an exception.”

(Tr., p. 161.)

6. The court erred in overruling the following objections of defendants to the questions asked of plaintiff's witness M. I. Chappell, on direct examination, in the following respects:

“Q. State whether or not you noticed any blood or anything else upon the rails of the track prior to the time you saw the body east of a point where you found the body.

“MR. FURMAN. This is objected to as leading and also suggestive.

“Objection overruled.

“To which ruling of the Court counsel for defendants asked for and allowed an exception.

(Tr., p. 161, to p. 162.)

7. The court erred in overruling the following objection of defendants to the question asked of plaintiff's witness M. I. Chappell, on direct examination, in the following respect:

“Q. Was there any blood or anything of that kind?

“MR. FURMAN. I object to this as leading and suggestive.

“Objection overruled.

“To which ruling of the Court counsel for defendants asked for and was allowed an exception.

“Q. About how far east of the body was it that you found the blood?

“MR. FURMAN. I object to this as leading and also repetition.

“Objection overruled.

“To which ruling of the Court counsel for defendants asked for and was allowed an exception.

(Tr., p. 162, to p. 163.)

8. The Court erred in overruling the defendants' objection to the question asked of plaintiff's witness M. I. Chappell, on direct examination, in the following respect:

“Q. What have you to say as to whether or not it should be rung continuously?

“MR. FURMAN. This is objected to as leading and suggestive.

“Objection overruled.

“To which ruling of the Court counsel for defendants asked for and was allowed an exception.

(Tr., p. 163.)

III.

ARGUMENT No. I.

The complaint does not state a cause of action in favor of the plaintiff and against the defendants, or any of them, under the laws of Montana or the United States.

It appears from the face of the complaint that this suit is brought on the doctrine of the last clear chance. Certainly if it be not brought on that doctrine, then the uncontradicted evidence of David Clement, Jr's. contributing negligence precludes a recovery. If the suit is brought on the doctrine of the last clear chance, the pleading is not sufficient to state a cause of action in favor of the plaintiff and against the defendants, or any one of them.

The doctrine of the last clear chance is well established in Federal law and the particular incidents that attach to a proper application of the doctrine have been repeatedly specified. We call the attention of the court to the case of *Iowa Central Railway Co. v. Walker*, 203 Fed. 685. That case is on all fours with the proposition here urged, and we quote a considerable portion of the opinion in that case:

“‘But, as I have already said to you, down to the time he was within the danger limit, in my judgment, there is nothing to be considered by you. Now, after he was within the danger limit, could he, by the exercise of diligence, have been seen by the engineer to be inside of the danger limit? Then, from that point, had this engineer exercised care and freedom from negligence, as he ought to do, could he then have averted the injury? If not, then your verdict will be in favor of the company. If he, the engineer, could have averted the injury after he saw the hazardous position in which the plaintiff had placed himself, then you will find a verdict for the plaintiff.’

“This instruction was faulty, in that it submitted to the jury the question as to whether or not, in the exercise of diligence on the part of the engineer, he could have discovered that the plaintiff was inside the danger limit. The instruction in that respect was excepted to by defendant.

“In *Denver City Tramway Co. v. Cobb*, 164 Fed. 41, 90 C. C. A. 459, Justice Van Devanter, then Judge Van Devanter, speaking with regard to the exception which permits plaintiff to recover, notwithstanding his own contributory negligence, said:

“‘The exception does not apply where the plaintiff’s negligence or position of danger is *not discovered* by the defendant in time to avoid the injury.’

“In *Hart v. Northern Pac. Ry. Co.*, 196 Fed. 180, 116 C. C. A. 12, this court said:

“ ‘It presupposes or concedes the existence of contributory negligence, and seeks to avoid its consequence by subsequent occurrences. If it were true that Starr was in a state of actual peril, that the defendant *had actual knowledge* of that peril, and *after that knowledge was acquired* failed to exercise ordinary care to prevent injuring him, these facts might create a cause of action, or might excuse the contributory negligence which brought Starr into his position of peril.’

“Numerous other authorities might be cited to the same effect, to-wit, that the defendant’s liability under what is known as the last clear chance doctrine is *only where, after actual discovery* of the plaintiff’s perilous position the injury could be avoided by the exercise of ordinary care and diligence.”

The Supreme Court of the State of Montana has passed upon the question of the doctrine of the last clear chance, and there is no conflict between the laws of this state and this rule of the Federal courts. The case of *Dahmer v. Northern Pacific Railway Co.*, 48 Mont. 152; 136 Pac. 1059, was a case in which the Supreme Court was called upon to determine the law with relation to this doctrine. Mr. Chief Justice Brantly wrote the opinion of the court.

“It may be remarked, however, that the rule is limited in its application to those cases only in which the plaintiff, or the person injured or his property, has by his own act been exposed to injury at the hands of the defendant, and the defendant, after discovering the situation of the person or property in time, has failed to use ordinary care to avert the injury. (1 Thompson on Negligence, Sec. 228.) A case calling for its application embodies three elements, viz.: (1) The exposed condition brought about by the negligence

of plaintiff or the person injured; (2) the actual discovery by the defendant of the perilous situation of the person or property, in time to avert injury; and (3) the failure of defendant thereafter to use ordinary care to avert the injury. All of these elements must concur, else the rule has no application, and liability must be predicated upon the failure of defendant to discharge toward the person injured or his property, some other duty imposed by law under the facts of the particular case as they are made to appear. The duty imposed by it is, not to use ordinary care to discover the peril and also to avert the threatened injury, but to avert the injury after the perilous situation is actually discovered." (And citations.)

The court discusses, further, a doubt that seems to have lurked in the minds of different lawyers with relation to the application of this doctrine, but it does not qualify or limit in any manner at all the statement hereinbefore quoted, and it says, without any qualification, that, whatever may have been in the minds of different lawyers within the State, the doctrine has no application unless all of the enumerated elements appear.

So, then, the conclusion from these considerations is that a complaint based upon the doctrine of the last clear chance fails to state a cause of action unless it is alleged that plaintiff's intestate was actually discovered in a place of peril, and there is a failure of proof unless it appears from the evidence that discovery was actually made.

The complaint in the case at bar pleads discovery alternatively. It says that David Clement, Jr., was discovered, or, by the exercise of ordinary care, could have been discovered. This is exactly the form of pleading condemned

in the cases hereinbefore cited, and falls far short of the requirements of the law of the State of Montana and of the United States.

It will be observed that there is equal failure of proof of discovery, all the evidence being that Clement, Jr., was never discovered in peril or at all until after he had expired. More will be said later with respect to the possibility of averting the accident after Clement, Jr., was discovered in a place of peril. Here we urge only that there was never a discovery at all of Clement, Jr., in a place of peril; and that it is not alleged that he was so discovered.

ARGUMENT NO. II.

It is error to permit counsel to lead his witnesses.

“A question which suggests to the witness the answer which the examining party desires is denominated a leading or suggestive question. On a direct examination leading questions are not allowed, except in the sound discretion of the court, under special circumstances making it appear that the interests of justice require it.”

Revised Codes of Montana 1907, Sec. 8019.

The function of law is to protect the rights of parties. One of the provisions calculated to protect a party who has a cause pending before a jury is this section of the Revised Codes of Montana. Your Honors are too familiar with the effect upon the minds of the jury of the habit of some lawyers in testifying before a jury by means of the questions that they ask, to require appellants to waste any considerable space upon the proposition that it is most danger-

ous to permit counsel to ask, in the presence of a jury, questions which are in form forbidden by the statute.

It is a matter of the utmost materiality to litigants whether counsel for the opponent shall be permitted to suggest, by innuendo and question, thoughts to the minds of the jury that the examination of the witness on the stand would not justify. There are, undoubtedly, circumstances which justify the court, in its discretion, in permitting counsel to ask questions which lead their witness and to suggest the answer. The Code section recognizes such a contingency, and provides for it, with the very clear expression, however, that it shall not be allowed except in the sound discretion of the court, under special circumstances that make it appear that the ends of justice require it. It does not appear from any authority that we have read, and we have not heard it suggested, that the fact that a witness is not giving the answer sought by counsel is a sufficient showing that the ends of justice require the court to permit the question.

We raise no question at all about the form of introductory questions; but we do urge most respectfully, but earnestly, that it is a deprivation of a material right for opposing counsel to be permitted, in the absence of the showing provided for by the statute, during the examination in chief with respect to matters of moment and materiality, to ask questions that are vicious in their form. It is not the substance of the answer that does the damage, but the form of the question, and the suggestion, by asking it, on the part of eminent and learned lawyers, whose presence has weight with the jury, is the violation of a right preserved

to a litigant by the Code of this state. The Code does not say that leading questions may be asked about matters which in the opinion of the trial judge are not of the utmost materiality; it says that they shall not be asked at all, except under stringent and rigidly applied conditions; and it is error of a most prejudicial kind for the court to permit the infraction of this rule; and, until the legislative body of the State repeals the act we believe that litigants are entitled to the full measure of protection contemplated and provided for.

ARGUMENT NO. III.

David Clement, Jr., was guilty of concurrent negligence, which precludes any recovery in this action.

All the witnesses who testified in this case agreed that the train first came in sight of the milk wagon when it was approximately four hundred feet east of the crossing, and the wagon itself was approximately one hundred and fifty feet south of the crossing. The view was equal and wholly unobstructed. There was never the slightest effort made by anyone in the milk wagon to check the speed of the horses, which jogged along at a very uniform, steady gait, to the northward at a rate of four or five miles per hour, only slightly less than that of the train itself, until the time when Chappell jumped off the running-board, just in time to avert accident himself, at a time when the horses' heads were just upon the track of the railroad, and at a time when we believe the evidence justifies us in saying that no human agency could have averted the injury.

Human experience tells us that the team could have been stopped at any instant in a second's interval of time; and the evidence is conclusive that the negligence of David Clement, Jr., continued until the very instant of his accident, and there never was even an infinitesimal space of time after his negligence ceased prior to the happening of the accident; his negligence did not cease until the instant of the accident and his death. That being true, no recovery can be had. Authorities on this point are numerous and of great weight. We do not assume to quote more than a few of the leading cases.

Dunworth v. Grand Trunk Western Ry. Co., 127
Fed. 307, at page 310,

says:

“There are no facts disclosed in this record calling for the application of the modification of the rule. It does not appear that the presence of the deceased upon the track was observed by the locomotive engineer, or that after seeing him, and after knowledge that he was unobservant of his danger, there was time to avoid the catastrophe. To bring the case within the modification of the rule it is incumbent upon the plaintiff to make a showing calling for its application.”

Southern Ry. Co. v. Carroll, 138 Fed. 638,

is a case in which a traveler, knowing of a railroad crossing, as David Clement, Jr., knew of this crossing, approached it at night in a carriage with drawn side curtains, without looking or listening for the approach of a train which was in sight and hearing. The traveler was driving at a dog trot. He testified that he had crossed the cross-

ing several times in the day time. In such an instance, the Circuit Court of Appeals for the Fourth Circuit says that the law in the case is clear, that "the traveler is required to give way to any train which is in sight or hearing"; and the traveler who knows of the crossing must look and listen for approaching trains before even attempting to cross a track, and he must begin to look and listen at such a distance from the track as to enable him to stop in case he hears an approaching train. "If the unexplained evidence shows that the injured person could certainly have seen the train in ample time to avoid it if he looked, it is conclusively to be presumed that he did not look, or did not heed, and he is to be held negligent as a matter of law." "Nor is it an excuse that the usual or statutory signals of approaching trains were not given."

Schofield v. Chicago Ry. Co., 114 U. S. 615.

In the *Carroll* case the court ordered judgment for the defendant.

Illinois Central R. Co. v. Ackerman, 144 Fed. 959, is a case very similar in its physical aspects to the one at bar. In that case, the court said that a look when the deceased was fifty feet from the point of collision would have revealed to him the approaching train at any point within four hundred feet, or thereabouts; and the legal duty imposed upon the injured man in that case was to look and listen, and "the men upon the train were not obliged under the circumstances to anticipate his negligence. They could very well have assumed either that he knew of the approach of the cars and intended to stop at the customary safe dis-

tance or that he would look when near the track and then stop before going upon it." "He was not in a place of danger until it was too late to prevent the accident. The negligence of the employees of the railroad company and that of the deceased were *concurrent* and *continuous* down to the very moment of the collision, and there is no room for the contention that the negligence of the latter should be regarded as a known condition upon which the negligence of the former subsequently operated." A directed verdict should have been granted.

C., M. & St. P. Ry. Co. v. Clarkson, 147 Fed. 397, says:

"Suppose there had been a flagman at the crossing, what fact is there in evidence from which any jury should be allowed to infer that the life of Clarkson would have been saved? The place where such flagman would have been Funda was about with his lantern alight, in plain view of Clarkson, if then approach the crossing."

So is it here. The train was coming in plain view, without an obstruction; and if Clement, Jr., had been paying any attention at all for his own safety, he would have avoided the accident. The slightest precaution even at the last minute would have saved him; but he observed no precaution, and was negligent up to the instant of the accident.

"In any permissible view of the facts and the law of this case, this verdict cannot stand except upon the license of a mere conjecture, as needful to be restrained as a disguised confiscation. The court should

have granted the request of the defendant for a directed verdict.” (147 Fed. 408.)

We urge the same proposition about the case at bar.

St. Louis & S. F. R. R. Co. v. Summers, 173 Fed.
358,

discusses the applicability of the doctrine of the last clear chance, and says that it is well settled that, notwithstanding the contributory negligence of a traveler in crossing a railroad track, which precludes recovery for the primary negligence of the railway company in operating its train so as to bring about a collision with him, “yet another and different cause of action arises in favor of the traveler if for any reason he is exposed to imminent peril and danger, and the railroad company, after actually discovering that condition, could, by the exercise of ordinary care, have stopped its train, or otherwise have avoided injuring him, and failed to do so.” (Citations.) “But in the application of this rule *care must be taken* to avoid undermining the rule of contributory negligence. Such negligence of the traveler in law fully exonerates the railroad company from the consequences of its original negligence, and some *new* and *subsequent* act of negligence must arise to create a cause of action; and this new or secondary act must be established by proof, unaided by the former acts, which have been excused by the traveler’s contributory negligence.”

“It may be that the engineer might have seen, and should be presumed to have seen, Magar approaching the main track; but this would constitute no evidence that his peril was appreciated. Common observation and experience teach that men engaged in hauling

freight about railroad stations frequently approach close to the tracks with their teams and stand there while trains pass near them. Engineers in charge of trains must be presumed to be familiar with this practice, and to operate their trains in the light of it. It would constitute a serious embarrassment to traffic, if engineers should be required to stop or slow up upon seeing the approach of a wagon to the tracks. They have a right to presume that the drivers will observe the precaution which the law imposes upon them as a duty, and keep off the tracks on the approach of trains."

Colorado & S. Ry. Co. v. Tucker, 173 Fed. 605,

holds that a man who walked, in the day time, upon a crossing, immediately in the way of an engine which was backing toward the crossing at a speed of five or six miles an hour, and in plain sight, with nothing to obstruct the view, is, as a matter of law, chargeable with negligence which precludes recovery for his death.

Illinois Central R. Co. v. Nelson, 173 Fed. 915,

is a case strikingly parallel to the case at bar. There, as here, substantially the only evidence of negligence was conflicting testimony with relation to the distance in which a train moving at the rate of four or five miles per hour could be and should be brought to a stop. In that case, plaintiff's witnesses testified that, under the circumstances, the train should be stopped from twelve to twenty feet. As a matter of fact, it ran more than one hundred feet. In that case, the only evidence of negligence was that after the discovery the train ran farther than the plaintiff's witnesses thought it should run. In this case, there is, to be

sure, no discovery of David Clement, Jr., in time or at all; but there is testimony on the part of plaintiff's witnesses, who, it will be observed, were all discredited, disgruntled, and discharged railway employees who either had pending at that time litigation against railroad corporations or had settled such litigation within a short while prior to the trial of the case in which they gave testimony, that, in their judgment, the train ran too far past the crossing. In the case cited, the Circuit Court of Appeals for the Eighth Circuit was of the opinion that a directed verdict should have been granted on facts substantially the same as in this case.

Horan v. B. & M. R. Co., 184 Fed. 453,

holds that, as a general proposition, an engineer is not chargeable with negligence for not stopping his train on the approach of a traveler; because, in the absence of exceptional situations, he would be justified in assuming that the traveler would see the train and would not walk in front of an approaching engine.

Northern Pacific Ry. Co. v. Tracey, 191 Fed. 15,

holds that the question of negligence is a question of law for the court when the facts are undisputed and the inferences are so clear that reasonable men ought not to differ on them. That suit was founded on a statutory duty of the company which was violated. The court says that a traveler who fails to exercise due care cannot complain of an injury received through the negligence of the railway company, where his own negligence contributed.

Northern Pacific Ry. Co. v. Alderson, 199 Fed. 735, holds that travelers are required to use their senses of sight and hearing on approaching crossings. The propositions under discussion in this case differ from the ones in the case at bar; but recognition is made of the rule for which plaintiffs in error contend.

Iowa Central Ry. Co. v. Walker, 203 Fed. 685, has already been quoted at considerable length on the proposition that the complaint does not state a cause of action. That case supports also the present contention.

Kaiser v. N. P. Ry. Co., 203 Fed. 933, holds:

“The failure to ring the bell or blow the whistle of the engine was, at most, concurring or succeeding negligence, which failed to prevent the natural consequences of plaintiff’s carelessness, but was not of itself such negligence as would render defendant liable. Ordinary care required that he be alert in the use of his senses of sight and hearing to guard himself from harm, and no reliance on the exercise of care by persons in control of engines or trains can excuse his failure to exercise such care.”

Coleman v. Atlantic Coast Line, 69 S. E. 251, holds that there can be no recovery by one injured at a crossing, where his negligence proximately contributed to the injury, though the company was also negligent. Discussing the question when a traveler is bound to look, this court holds that it is his duty to look in time to save himself; and, when the traveler is careless and indifferent, he cannot complain if injured.

McNeill v. Atlantic Coast Line, 83 S. E. 704,

is a case in point on the contention that there was no lamp burning on the head of this train. There is testimony that it was burning when the engine left the roundhouse; but Willoughby testified that it was not burning at the time of the accident. The McNeill case holds that in an action for the death of a person struck by a train at night, where the evidence showed the failure of the train to carry a headlight, but the evidence of the cause of death was circumstantial, and was as consistent with decedent's coming on the track suddenly in front of the train as with any other theory, there could be no recovery as a matter of law.

It cannot be seriously argued in this case that the proximate cause of Clement, Jr.'s death was the absence of a light on the head end of the engine; because the testimony is that Chappell was on the head end of the train, and he claims stood with a lantern in his hand. The proximate cause of Clement, Jr.'s, accident was his negligence in driving immediately in front of an approaching train at a time when the engine men could not avoid injuring him.

Van Winkle v. N. Y. C. & St. L. Co., 73 N. E. 157,

holds that a railway track is itself a warning of danger; and cites authority supporting that proposition; and says, further, that while the burden of showing contributory negligence rests upon the defendant, if the testimony given on behalf of the plaintiff shows that condition obtains, there can be no recovery.

Smith's Admr. v. Cincinnati, N. O. & T. P. Ry. Co.,
142 S. W. 1047,

holds that an engineer had the right to assume that intestate would heed the warning of the approaching train and keep out of its way. "It was not incumbent on him to stop the train until it became reasonably apparent that the intestate was oblivious of the danger." In that case, as in the one at bar, when it became manifest that plaintiff's intestate was in peril, it was too late to save him. A directed verdict was proper.

Powers v. I. C. Ry. Co., 136 N. W. 1049,

holds that "the engineer did see the plaintiff when he was eight or ten rods east of the track, it is true; but he had the right to suppose that plaintiff would exercise reasonable care and not drive on to the track ahead of the train: and, when he discovered that he did not intend to stop, it was then too late to prevent the collision." A verdict should have been directed on such a showing of facts.

Bates v. L. & N. R. Co., 64 So. 298,

says the law is too well settled to require much discussion; and that when plaintiff's testimony shows that he was guilty of contributory negligence, as a matter of law he is precluded from recovery. In that case also there was expert testimony about the distance in which a train could be stopped.

Labelle v. Central Vermont R. Co., 88 Atl. 517,

was a case in which a verdict was directed for the defendant. Plaintiff excepted on the ground that he was entitled

to go to the jury on the doctrine of the last clear chance. His contention was held to be wrong because of the fact that, while the plaintiff, who was driving gentle and well-managed horses in a safe place at a safe distance from the track, the train was within his view and could have been seen; and if he did not see it, it was because he was not looking and listening, as the law requires. Failing to exercise his faculties in this respect, going upon the crossing was negligence that precluded a recovery, unless this negligence became remote, within the doctrine of the last clear chance; and the statement of the applicability of that doctrine as it is made by the court in this instance, is a clear and concise statement of the proposition urged in this section on behalf of the plaintiffs in error.

“Should the case have been submitted to the jury upon the doctrine of the ‘last clear chance’? The negligence of the plaintiff proximately contributing to the accident continued as long as it was possible for him to avoid personal injury. He was walking between the front wheels and the body of the dump cart, his horses perfectly manageable. The space between the forward wheels and the body was sufficient for cramping purposes, and there was no evidence tending to show that it was not large enough for the plaintiff to go through and outside the wheels, thereby to leave the team at any time before he went upon the track, if need be, for his safety. He could have done this until the train was so near, according to the undisputed evidence, that it was no longer possible for those in charge to prevent a collision. Thus it appears that the plaintiff’s negligence, proximate in character, was concurrent with that of the defendant (assuming that the defendant was negligent) as long as it was possible for the latter to avoid the accident. In this respect the

case is not distinguishable from that of Flint's Admr. v. Central Vermont Ry. Co., cited above, and the doctrine of the 'last clear chance' does not apply. French v. Grand Trunk Ry. Co., 76 Vt. 441, 58 Atl. 722; Butler v. Rockland, etc., St. R. Co., 99 Me. 149, 58 Atl. 775, 105 Am. St. Rep. 267; Green v. Los Angeles Terminal R. Co., 143 Cal. 41, 76 Pac. 719, 101 Am. St. Rep. 68."

Green v. L. A. T. R. Co., 76 Pac. 719,

is a case absolutely in point, was argued with great skill and ingenuity, and was carefully considered. It is hardly practicable to quote from the case at all without quoting at such great length as will unduly tax the patience of this Court; but the case holds that the doctrine of the last clear chance applies in cases where the defendant knows of the plaintiff's danger, was aware of the dangerous predicament, and fails to do something which he could do to avoid the injury; *but the doctrine has no application to a case where both parties are guilty of concurrent acts of negligence, each of which said acts contributes to the accident and the injury complained of at the very instant when the accident occurred.*

That is the exact situation in this case. At the very instant of collision and accident, the negligence of both parties was concurrent and active, if, indeed, defendant was negligent at all; and the doctrine of concurrent negligence, rejected by the trial judge in the cause at bar both on motion for a directed verdict and on motion for a new trial, is thoroughly established in law, is well grounded in reason, and controls in this case.

Rowe v. So. Cal., 87 Pac. 220,

holds that because a decedent was in no danger until he stepped on the track, and because the engineer had no notice that decedent would step upon the track, the latter's contributory negligence defeated the cause of action, and the doctrine of the last clear chance did not apply, because when it was reasonable for him to think that there was danger, it was too late to avoid the accident. "Trains are not ordinarily stopped or even held stationary to allow people on foot to pass in front of them"; and we submit that a milk wagon is in no better position on this proposition than a pedestrian. And the court holds that contributory negligence is a proper question for the court in cases of this kind.

Coleman v. A. T. & S. F. Co., 123 Pac. 756, says:

that the plaintiff and his driver were negligent in failing to look for an approaching train that they could have seen in time to stop and avoid the collision; that the conductor could have seen and stopped his train, had he been vigilant, and so he was negligent; and the collision was the immediate result of the concurring negligence of both parties. That being true, defendant should have judgment, and it was so ordered.

Dyreson v. U. P., 87 Pac. 680,

hold that there can be no recovery for an injury to a plaintiff caused by negligence of the defendant if the plaintiff could have avoided the accident by the exercise of ordinary care on his own part, although the defendant should

have discovered plaintiff's peril in time to have prevented the accident, provided plaintiff's negligence continued up to the instant of his injury, and where, with reasonable diligence before that time, he could have learned of his danger and escaped its consequences; that is to say, the doctrine of concurrent negligence is plainly affirmed and expressed by the Supreme Court of Kansas in this case, which appears in

7 L. R. A. (N. S.), at page 132.

The note to this case should be quoted substantially as it appears, because it is a clear exposition of the doctrine of concurrent negligence, relied upon by the plaintiffs in error, provided the court deem the pleadings sufficient to bring the case under the doctrine of the last clear chance. If that doctrine be not sufficiently pleaded, there can be no contention that the doctrine of contributory negligence does not immediately preclude defendant in error from recovery.

Drown v. N. O. T. Co., 10 L. R. A. (N. S.) 421,

is a strong case supporting our contention that the doctrine of concurrent negligence and evidence of continuing negligence on the part of an injured person till the very moment of his accident controls the case at bar and defeats recovery. There, as here, the driver of plaintiff's team drove toward the track until he collided with a car. He could see for a distance of two hundred or two hundred and fifty feet; but, without doing anything to avoid injury, he risked his life and the principal's property, on the presumption

that defendant's servants would make no mistake. That is not quite the situation here, but substantially so. In that case, the court impressed upon the jury the doctrine of the last clear chance. There is a very long and learned discussion of the applicability of the doctrine; but the gist of the opinion is contained in the following words:

“Assuming that the defendant was negligent in not seeing the buggy on the track and in not avoiding the accident, yet the plaintiff's negligence was continuous and was concurrent at the very moment of the collision. It proximately contributed to the collision, for without it the collision would not have occurred. There was no new act of negligence by the defendant, which was independent of the concurrent negligence, and which made the latter remote. *Therefore, there was no place in the case for the doctrine of the 'last clear chance.'*”

And that doctrine does not apply, nor does it in the case at bar. This is very eminent authority, on all fours with the present case.

Southern Ry. Co. v. Bailey, 67 S. E. 365, denies the applicability of the doctrine of the last clear chance, on the ground that plaintiff's negligence continued till the very instant of accident, and was therefore contemporaneous and concurrent with the negligence of the defendant, if defendant was negligent at all, there being no showing at all of wantonness or willfulness. The case quotes with approval from

Consumers Brewing Co. v. Doyle, 46 S. E. 390, which holds that if the continuing negligence of a plaintiff

up to the time of the injury concurs with the negligence of the defendant in causing the injury, plaintiff cannot recover; also from

Robards v. Indianapolis St. R. Co., 66 N. E. 66, 67
N. E. 593,

the language of the doctrine of prior and subsequent negligence implies that the principle is not applicable when the negligence of the plaintiff and that of the defendant are practically simultaneous; also from

Green v. L. A. R. Co., 76 Pac. 719,

that it (the doctrine of last clear chance) "has no application, however, to a case where both parties are guilty of concurrent acts of negligence, each of which, at the very time when the accident occurs, contributes to it."

O'Brien v. McGlinchy, 68 Me. 552,

says that the doctrine of last clear chance does not govern where both parties are contemporaneously and actively in fault, and, by their mutual carelessness, an injury ensues to one or both.

Wabash Ry Co. v. T. L. & T. Co., 98 N. E. 64,

rests on the ground that the negligence of the plaintiff was continuous and concurred with that of the defendant until the very instant of the accident; and that fact is fatal to the application of the doctrine of the last clear chance so as to support a recovery, where the plaintiff's danger was not actually discovered until it was too late to avoid injury and defendant's negligence consisted in keeping an incompetent watchman at a crossing and in running a train at a

rate in excess of that allowed by the City Ordinance. This case holds that the doctrine of the last clear chance cannot be applied, because decedent had the power down to the last instant to avoid the injury. It quotes with approval

Evans v. Adams Express Co., 122 Ind. 362, 367; 23 N. E. 1039, 1041,

where the following language was used :

“Where the negligence of two persons is contemporaneous, and the fault of each operated directly to cause the injury, the rule deducible from the authorities is that the plaintiff cannot recover, if by the exercise of ordinary care on his part he might have avoided the injurious results of defendant’s negligence. Chicago, etc., R. Co. v. Hedges, 118 Ind. 5, 20 N. E. 530; Lake Shore, etc., R. Co. v. Brown (1908), 41 Ind. App. 435, 84 N. E. 25, and cases cited; Indianapolis, etc., R. Co. v. O’Donnell, 35 Ind. App. 312, 73 N. E. 163; Hammers v. Colo. & South. R. Co. (1911), 128 La. 648, 55 So. 4, 34 L. R. A. (N. S.) 685; 3 Elliott, Railroads, Sec. 1175; Dyerson v. Union, etc., R. Co., 74 Kan. 528, 87 Pac. 680, 7 L. R. A. (N. S.) 132, and note, 11 Ann. Cas. 207; Himmelwright v. Baker, 82 Kan. 569, 109 Pac. 178; Elliott v. New York, etc., R. Co., 83 Conn. 320, 76 Atl. 298; Bourrett v. Chicago, etc., R. Co. (Iowa), 121 N. W. 380; 66 Cent. Law J., 215; Sherman & Redfield on Neg. (5th ed.), Sec. 99; Drown v. Northern, etc., Co., 76 Ohio St. 234, 81 N. E. 326, 10 L. R. A. (N. S.) 421, 118 Am. St. Rep. 844; Rider v. Syracuse, etc., R. Co., 171 N. Y. 139, 63 N. E. 836, 58 L. R. A. 125; Gahagan v. Boston, etc., R. Co., 70 N. H. 441, 50 Atl. 146, 55 L. R. A. 426; Green v. Los Angeles, etc., R. Co., 143 Cal. 31, 76 Pac. 719, 101 Am. St. Rep. 68; Burns v. Louisville, etc., R. Co., 136 Ala. 522, 33 So. 891; O’Brien v. McGlinchy, 68 Me. 552; Franklin v. Engle, 34 Wash. 480, 76 Pac. 84.”

An investigation of practically all the cases in which the doctrine of the last clear chance is sought to be applied, shows that the true view of the law and the one best supported by carefully reasoned cases is that the doctrine may apply, despite the fact that the defendant's negligence was no more than a failure to perform its duty in discovering danger; but, in every such case, it is an indispensable condition that before the doctrine can be applied, the evidence must conclusively show that plaintiff's negligence has wholly terminated and culminated while it was still possible for the defendant to avoid the consequences of collision; and, if the negligence of the plaintiff continued till the very instant of the accident, it comprises concurrent negligence, and the doctrine of the last clear chance is never permitted to prevail.

In Montana and in the Federal Court, discovery is a prerequisite; and, on the view most favorable to the defendant in error, there is no conflict of law on the proposition that the evidence introduced on behalf of plaintiff precludes his right of recovery.

Railroad Co. v. Houston, 95 U. S. 697,

says that the neglect of train men to give proper signals approaching a crossing does not relieve a traveler of the necessity of looking out for himself. Before attempting to cross, the traveler is bound to use his senses to look and listen, in order to avoid accident. If he omits to use his senses and walks thoughtlessly on the track; or, if after using them, takes a chance on crossing the track, and is injured—in either instance, he is deprived of any right to

complain, and must suffer the consequences of his own temerity.

Schofield v. C., M. & St. P. Ry. Co., 114 U. S. 615, holds in conformity with the doctrine of the *Houston* case, cited. The case holds that a verdict should be directed for the defendant in a case where a person in a sleigh drawn by one horse, traveling a road with which he was familiar, near a railroad crossing which he knew, could have seen a coming train if he had looked. He did not look, and was hurt; and, despite the fact that the train was an irregular one and running at a high rate of speed, and did not whistle or ring a bell, his contributory negligence precludes recovery.

Northern Pacific Ry. Co. v. Freeman, 174 U. S. 379, was appealed from the Circuit Court for the District of Washington to the Circuit Court of Appeals for the Ninth Circuit; thence to the Supreme Court, where a judgment on a verdict for plaintiff was reversed, and the cause remanded to the Circuit Court of Washington for a new trial. This case holds that the duty of a person approaching a railway crossing, whether driving or on foot, to look and listen, is so elementary and has been affirmed so many times that a mere reference to the *Houston* and *Schofield* cases, *supra*, is sufficient illustration of the general rule. There were three witnesses to the accident. They were two hundred or two hundred and fifty feet away. Freeman drove his horses at a slow trot, at a uniform rate of speed, right up to the time of the accident; that he looked straight before him, without turning his head either way; that the

team did not swerve, but trotted directly on to the crossing, and that the deceased made no motion to stop until just as the engine struck him. Freeman was a young man, eyesight and hearing good, knew the crossing, and at a distance of forty feet from the railway track could have seen the train approach for a distance of three hundred feet. The court quotes the *Houston* case, *supra*, with approval, and says that failure to whistle or ring the bell was no excuse for plaintiff's negligence. "She was bound to look and listen before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger. Had she used her senses, she could not have failed both to hear and to see the train which was coming. If she omitted to use them, and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others." The court says, further, that the facts are that the deceased, Freeman, approached a well known crossing, with the train in full view. If he had used his senses, he could not fail to see it. Notwithstanding that fact, the accident occurred.

"Judging from the common experience of men, there can be but one plausible solution of the problem how the collision occurred. He did not look; or, if he looked, he did not heed the warning."

Under such circumstances, which are on all fours with the case at bar, the Supreme Court of the United States was of the opinion that the defendant was entitled to a

directed verdict. Such, we contend, is the right of the plaintiffs in error in this case.

ARGUMENT NO. IV.

There is no evidence that David Clement, Jr., survived the accident, and the motion for a directed verdict should have been granted; and it was error to enter judgment on the verdict.

Plaintiff below must prove the essential averments of his complaint by a fair preponderance of the evidence, or his cause fails. This is admitted to be the law.

Corcoran, Admx., v. B. & A. Ry. Co., 133 Mass. 507, at page 509, holds that the burden of proof is on the plaintiff to show that her intestate survived. The question being left to conjecture, the evidence would not justify the jury in finding that the plaintiff had sustained this burden of proof; and a directed verdict for the defendant is right.

The case of

Melzner v. N. P. Ry. Co., 127 Pac. 146,

on page 148, clearly recognizes the burden upon the plaintiff below to show that his intestate survived his injuries for an appreciable length of time. We do not understand that counsel for defendant in error make any contention adverse, but contend only that the jury were entitled from the evidence to conclude that there was a survival. Plaintiffs in error contend that there is no evidence justifying such a conclusion, and that the failure to introduce such evidence was fatal to the contention of defendants in error.

Respecting the evidence in this case, the same thing must be said here as was said in the case of

Railroad Co. v. Pendergrass, 69 Miss. 425, at page 434:

“On the few horrible facts in evidence as to the death of the deceased, we cannot consent that the evidence shows that he survived the injury. He was run over by a swiftly moving train, under circumstances undisclosed, and was ground to pieces, and the fragments strewn along the track, and near it, for seventy or eighty feet. To say the jury was warranted in holding that he survived the injury for any appreciable space of time, however short—that his death was not instantaneous—is impossible.”

That is the condition of the evidence here. There is absolutely no testimony standing in this record respecting any survival of Clement, Jr. The only man who testified in that regard is Chappell, and his testimony was rejected by the trial judge, who states in his memorandum opinion (Tr., pages 22-25), that if the verdict depended in any degree upon Chappell's testimony, a new trial ought to be and would be granted. The trial judge said that when found deceased was dead. (Tr., p. 23, line 18.)

The survival statute of Montana presupposes a cause of action in favor of the deceased. It does not create a new cause of action; merely preserves to the heirs or representatives of the deceased the right to sue, which deceased had during his life time. This proposition is settled in the case of

Dillon et al. v. Great Northern Ry. Co., 38 Mont. 485; 100 Pac. 960.

In that case, the court decided, upon the agreed statement of fact that Dillon was instantaneously killed, that no cause of action survived to his estate, reasoning that in his life time plaintiff's intestate had no cause of action. The Supreme Court of Montana, speaking by Mr. Justice Holloway, quotes with approval (100 Pac., 965) from a Massachusetts case in the following language:

"The cause of action must accrue during the life time of the party injured. Here there was no time during the life of the intestate at which a cause of action could accrue, because the life closed with the accident from which a cause of action would have otherwise accrued."

Kearny v. Boston, 9 Cush. 108.

Again, quoting from the Supreme Court of Minnesota, on the same and following pages, it approves this language:

"We are of the opinion that the personal representative has no right of personal action where the deceased never had such right, and that where death was simultaneous with injury it is impossible to the healthy mind to conceive of a right of action in the man instantaneously killed."

We do not understand that defendant in error makes any contention adverse to this view, and therefore pass further consideration of this proposition.

We urge that it is a simple rule of evidence that the burden of proof is upon the plaintiff. To prevail in this case, the plaintiff below must show survival by plaintiff's intestate for an appreciable length of time after the accident, and there is no burden upon the defendants below to show

that plaintiff's intestate did not survive for that appreciable length of time. In the absence of proof, it is patent that the plaintiff has failed to prove an essential averment; and his failure is fatal to his contention. There is no evidence introduced in this case that any of the witnesses to the fatal accident had any knowledge of the presence of the plaintiff's intestate within the enclosed milk wagon until after the accident had happened and the train was brought to a stop and investigation made. Chappel, who was the witness closest to the wagon, testified that he heard no outcry of any kind or character at the time of the collision. There was no testimony that Clement, Jr., was seen within the wagon; and what happened to Clement from the time of the collision at the crossing until he was discovered beneath the train is left wholly and entirely to speculation and conjecture.

Passing, temporarily, other considerations, it is the law in this State that there must be more than a mere scintilla of evidence to justify a verdict, or it will not be permitted to stand. This has been the law since the case of

Pierre v. G. F. & C., 22 Mont. 445; 56 Pac. 868; and cases following that authority.

What evidence was submitted to the jury which will justify them in concluding that Clement received any injury prior to the fatal shock which swept his life away within the twinkling of an eye? There is not, we respectfully urge, a suggestion anywhere in the record that Clement received any injury before the top of his head was removed. We may, by speculation or conjecture reach an-

other conclusion, but a much more reasonable conclusion, if we are permitted to speculate, would be that the first injury received by David Clement, Jr., was the fatal injury, from the fact that Chappell, who was running beside the engine at the time of the collision and was almost at the very point of the accident, heard no outcry when the collision happened. We can well imagine that if the first blow was not instantaneously fatal, David Clement, Jr., would have screamed in anguish, and that his failure to so scream is probably accounted for by the fact that his first injury was instantly mortal. In view of the fact that from the time of the accident until his discovery under the train by Chappell there is an absolute dearth of testimony or facts from which any fair inference can be drawn, we respectfully urge that there has been a failure of proof of an essential averment or allegation, and that the nonsuit should have been granted.

We think it is clear from all the facts and circumstances in connection with the case that there was not such a survival as the Statute contemplates.

Chief Justice Shaw of Massachusetts, 9 Cush. 108, says:

“We are to ascertain what the intent of the Legislature was when they passed the law. It is not to be supposed that they intended to make a distinction between a case where the death was so instantaneous that there was no manifestation or life whatever and a case where there might be some slight spasmodic action of the body of the sufferer to indicate that life was not quite extinct.”

This is quoted with approval in

Lobenstein v. Iron Works, 146 N. W. 293; 297.

This brings us properly to a consideration of what is meant by "instantaneous death." The case last quoted considered the proposition, and we believe that their reasoning is correct. The court in this case said:

"We see no reason for splitting hairs as to what is meant by instantaneous death, though we can appreciate the difference between a continuing injury resulting in drowning or death by hanging, throwing from a housetop, etc., and one where a person survives the wrongful act in an injured condition."

And, quoting from *West v. Detroit*, 123 N. W., 1101, they approve this statement:

"Where there is a continuing injury resulting in death within a few moments, it is instantaneous, within the meaning of the Statute."

It is the defendants' contention in this cause that the injury which snapped the thread of life for David Clement was a continuing injury, so far as the evidence shows; and in the purview of the law, there was no appreciable time between the collision and Clement's demise.

A kindred case is that entitled "*The Corsair*," determined by the Supreme Court of the United States and reported in 145 *U. S.* at page 335. We direct the court's attention to page 348, where it is suggested that pain and suffering sustained by the intestate must be separable, as a matter of law, from the accident, and not substantially cotemporaneous with death. It appears clear to us that the Supreme Court in this case was clearly of the view that even a few seconds of conscious suffering would not satisfy the requirements of survival for an appreciable

time. In this connection we call the attention of the Court to the case of

Moyer v. Osbkosh, 139 N. W. 378.

That case, page 380, says where death is instantaneous or practically so, there is no cause of action in favor of the estate as a beneficiary. The case itself was brought under another theory; and we simply cite the case on the proposition that a spasmodic or convulsive twitching of the body after accident wholly fails to satisfy the law.

The case of

Carolina Railway Co. v. Shewalter, 161 S. W. 1136,

is a carefully considered case. We quote from cases cited with approval in that case. They quote

Kearney v. B. & W. Ry. Co., 9 Cush. 108,

with approval in the following language:

“If the death was instantaneous, and, of course, simultaneous with the injury, no right of action accrues to the person killed, and, of course, none to which the statute can apply. But if the party survives, lives after it, the right of action accrues to him, as a person in esse, and his subsequent death does not defeat it, but, by operation of the statute, vests in it, the personal representative.”

And, again, quoting from

St. Louis Ry. Co. v. Dawson, 56 S. W. 46, an Arkansas case,

they approve this statement:

“The survival of the action depends upon whether

the injured child lived after the act constituting the cause of action.”

In this case, we contend that there was a single accident; that the injury to David Clement, Jr., caused his instantaneous death, and that it is immaterial whether he received some slighter injury a second or two before the injury to his head, or whether he received the latter injury first. This cause is brought on behalf of the estate for injuries suffered by plaintiff's intestate which accrued to him during his lifetime. The case was tried on the theory that the particular injury on which recovery was sought was the injury which produced death. That injury was the injury to the head.

The clearest statement of what is meant by “instantaneous death” that we have been able to discover is found in

West v. Detroit, a Michigan case, reported in 123 N. W. 1101.

The court in that case said,

“Where there is a continuing injury resulting in death within a few minutes, it is instantaneous, within the meaning of the Statute.”

We wholly fail to see any difference between the case of a drowning person, who cannot be said to survive an appreciable length of time after the fatal accident, and the case of a person under the wheels of a train who in the course of a few seconds from the time of the collision is found dead. Viewed most favorably for the plaintiff, the injury during the few seconds is a continuing one, in the absence of evidence that the blow to the head was not first

and death was not instantaneous; and recovery by the plaintiff cannot be allowed on either theory. The test is, we urge, the question whether there was life after the accident; and we have been unable to find any reported opinion in which a recovery was allowed unless there was evidence of life after the accident. The cases which seem at first glance to oppose this statement, on investigation, prove to be cases in which there was evidence of life after the accident. In this case, there was but one accident. It began with the collision on the crossing. It ended with the death of plaintiff's intestate. It was a continuing accident, resulting in a fatality. After the accident happened, there is absolutely no testimony justifying a conclusion of survival at all. There is not a scintilla of evidence that the injury which crushed off the top of the head was not the first injury received by Clement, Jr.; and it is a fair inference, from the fact that the boy never screamed or made an outcry, that such was indeed the case.

We do not find a great number of reported decisions on the precise point at issue. The *CORSAIR* case, *supra*, is the only instance, so far as we have found, in which the Supreme Court of the United States touched the matter. The difficulty of the situation here lies in the question, What facts justify an inference of survival?

Michigan has two statutes; one, a survival statute, and the other, a death statute. The question has been before that court as frequently as before any.

Ely v. Detroit United Ry. Co., 127 N. W. 259,
was a case brought on two counts, one under each Act.

The court held there that the evidence that a plaintiff survived the original injury from ten minutes to half an hour was sufficient to bring it under the "Survival Act".

The case of

West v. Detroit United Ry. Co., 123 N. W., at 1102, is a case brought to recover damages for a drowning. The in death within a few minutes it is instantaneous, within the meaning of the Statute. We do not contend that the case passed on that point; but the construction by the court of what is meant by instantaneous death is unequivocal.

The case of

Cheatham v. Red River Line, 56 Fed. 248, is a case brought to recover damages for a drawing. The Federal Court for the Eastern District of Louisiana held, on the authority of *The Corsair*, *supra*, that the man's sufferings after he fell into the water and before he drowned cannot be taken into account, since they are substantially cotemporaneous with his death.

Perkins v. Oxford Paper Co., 71 Atl. 476, was a case in which plaintiff's intestate survived for seventy-five hours, and is not exactly in point, but is a well-reasoned case; and the reasoning supports the contention of plaintiffs in error on the proposition that there must be evidence of a survival.

Tiffany's Death by Wrongful Act, 2nd Ed., (paragraphs 74, 75, and 76),

classifies and discusses the holdings of courts of different jurisdictions; and

Corpus Juris, Vol. I., at page 197,
contains a statement and a note on the proposition.

These two texts cite substantial authorities, upon which plaintiffs in error rest their contention.

The law is well settled in Massachusetts.

Kearney, Admx., v. Boston & Worcester, 63 Mass.
108,

was a case brought on account of wrongful death. The court, stating that the death was instantaneous, ruled that the action could not be maintained; and in that case a girl, who was less than two rods from the place of the accident, saw the deceased girl suffer her injury, and saw her move her hands and feet slightly after the accident, but she only breathed once after the arrival of the witness and gave no signs of consciousness.

The facts in the case at bar are much stronger, from the standpoint of the plaintiffs in error, in view of the fact that the only evidence of any survival at all was rejected by the trial judge in considering the motion for a new trial.

Moran, Admx., v. Hollings, 125 Mass. 93,

was a case in which damages were sought for the death of a sixteen-year-old boy who was killed while in the employ of the defendants. He fell forty feet through four hatchways, and was killed by striking the lower floor of the defendants' building. The court directed a verdict for the defendants, despite plaintiff's contention that the dead

boy, in falling through the hatchways, might have struck against some obstacle, and thereby received injuries for which he might have a cause of action before he was killed.

Maher v. Boston & O. R. Co., 32 N. E. 950,

was a case brought to recover damages for the death of a brakeman who was knocked off the rear car of a train by contact of his head with a bridge; and, in this case, the court held that the evidence justified the inference that death was instantaneous, the lesions on the head being sufficient to produce instant death. They infer that the fact that there was no outcry after plaintiff's intestate fell was a fair indication that death was instantaneous. We have heretofore suggested in this brief that the fact that Clement, Jr., was never heard to make an outcry throughout the entire affair justifies the inference, on the authority of this case, that his first injury snapped the thin-spun thread of life. Even Chappell, whose testimony was, in the language of the Court, nicely calculated to meet the requirements of some authorities, would not say that he heard the slightest noise; and neither did Willoughby testify to any such noise, and probably he could have heard a scream had one been uttered.

**Mulchey (Mulchahey) v. Washburn Car Wheel Co.,
14 N. E. 106,**

held that a terribly crushed condition of the body, viewed in the most favorable light for plaintiff, failed to justify a conclusion of any conscious pain or suffering on the part of the intestate after he received his injuries. The mat-

ter being left to conjecture, plaintiff failed in that case for want of proof.

The case of

Carolina C. & O. Co. v. Shewalter, 161 S. W. 1136, is a Tennessee case, which considers at great length and with great clearness of expression the proposition of survival after accident. They reach the conclusion of law, which is settled beyond the peradventure of a doubt in Montana, that no right of action passes to the administrator when the killing was instantaneous.

The clearest expression of the law in Montana is to be found in the case of

Dillon v. Great Northern Ry. Co., 100 Pac. 960.

They approve the language of the Supreme Court of Mississippi in the case of

Illinois Central Ry. Co. v. Pendergrass, 69 Miss. 425; 12 So. 954,

in which it was said that where death was simultaneous with injury, it is impossible, with a healthy mind, to even conceive of the right of action in the man instantaneously killed. The court cites, with approval, the Kentucky case,

Hansford v. Payne, 11 Bush. 380,
and

Belding v. Black Hills, etc., Co., 3 S. D. 369; 53 N. W. 750,

which court came to the same conclusion in considering survival statutes.

The Dillon case was ordered dismissed by the Supreme

Court because it appeared, without controversy, that the plaintiff's intestate was instantaneously killed.

In this case, plaintiff stands, so far as the record before your Honors is concerned, in this condition: the only evidence of any survival at all was wholly rejected in a scathing arraignment by the trial judge of the witness who gave it. Possibly it may be contended that the trial judge erred in rejecting the testimony of Chappell, and that it should properly have been considered by him; but, in that case, defendant in error is impaled upon the other horn of the dilemma, because, the evidence being rejected, there was absolutely no testimony of a survival; and a new trial should have been granted. Defendant in error is compelled, then, to rely upon inferences of fact that may be drawn from the grewsome occurrence itself. No reasonable inference can be drawn adverse to the contention of plaintiffs in error that death was instantaneous. David Clement, Jr., was probably asleep in his milk wagon; and, in all human probability, never had a conscious instant of awakening from that sleep from the time of the collision until his death.

Respectfully submitted,

GEORGE F. SHELTON,

FRED J. FURMAN,

A. J. VERHEYEN,

Counsel for Plaintiffs in Error.

Service of the above and foregoing Brief is hereby acknowledged, and copy thereof received, this 24th day of April, A. D. 1915.

BK. Wheeler & H. G. Murphy
Counsel for Defendant in Error.

No. 2570

United States
Circuit Court of Appeals
For the Ninth Circuit

CHICAGO, MILWAUKEE & ST. PAUL
RAILWAY COMPANY, a corporation;
CHICAGO, MILWAUKEE & PUGET
SOUND RAILWAY COMPANY, a cor-
poration; J. E. WOODS, and M. I.
CHAPPELL,

Plaintiffs in Error,

v.

DAVID CLEMENT, as Administrator of
the Estate of DAVID CLEMENT, Jr.,
Deceased.

Defendant in Error.

Brief of Defendant in Error

Upon Writ of Error to the United States District Court
of the District of Montana

BURTON K. WHEELER,
A. A. GRORUD,
H. G. MURPHY,

Counsel for Defendant in Error.

Filed.....

Filed

MAY 10 1915

Clerk.



F. D. Monckton,

Deputy Clerk of the Court

Clerk

No. 2570

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Brief of Defendant in Error

STATEMENT OF THE CASE.

A reading of the statement of the case contained in the brief of plaintiffs in error discloses an omission which we deem of such importance that we supply it here: On page 2 of said brief, plaintiffs in error have omitted from the recital of the issues the allegations contained in the amended bill of complaint to the effect that the Clement boy (the deceased) was, after

the engine was run into the wagon in which he then was, dragged by the engine over and along the railroad track for a great distance and was drawn and dragged under the wheels of said engine and the same was then and there run and driven over him whereby he was crushed, maimed and injured and from which injuries he died. (Tr. p. 5.)

ARGUMENT.

For convenience we will reply to the brief of plaintiffs in error in the same manner as it is written, numbering the various subdivisions of our reply the same as they have their argument.

I.

The claim of plaintiffs in error that the amended complaint does not state facts sufficient to constitute a cause of action is one that deserves but little consideration, for two reasons, viz: 1. The demurrer interposed to the amended complaint, were, by the trial court overruled and plaintiffs in error given twenty days in which to answer, and that action by the trial court was "By consent of counsel." (Tr. p. 12); 2. The record is barren of any objection to the introduction of evidence at the beginning of the trial of the case. In view of these facts counsel for plaintiffs in error can not now seriously urge any objection which may have to the pleadings as they have voluntarily withdrawn their demurrers and proceeded with the trial of the cause upon the issues made by their denials. Objections of this character are seldom looked upon with favor

and if, with all reasonable deductions that can be drawn from a complaint, the facts alleged are sufficient to show a cause of action the pleading will be upheld.

Ditton v. Purcell, 21 N. D. 648; 132 N. W. 347.

However, we desire to comment briefly upon the argument of counsel for plaintiffs in error under this heading. They first state there is no allegation that the plaintiffs in error actually discovered the deceased in a place of peril, and cite the cases of Iowa Central Ry. Co. vs. Walker (8 C. C. A.) 203 Fed. 685 and Dahmer vs. N. P. Ry. Co., 42 Mont. 152, 136 Pac. 1059. These cases are ones in which the pleadings and facts are wholly different from the case under consideration.

In the case of Iowa Central Ry. Co. vs. Walker, *supra*, the allegations were that after the engineer discovered Walker in a place of peril, by the exercise of ordinary care, he (the engineer) could have avoided the injury. The Circuit Court of Appeals for the Eighth Circuit held: an instruction to be faulty, saying:

“It submitted to the jury the question as to whether or not, in the exercise of diligence on the part of the engineer he could have discovered that the plaintiff was inside the danger limit.”

and in that case is further given, as a reason for reversing the case and granting a new trial, the following:

“At the close of all the evidence, defendant requested the court to instruct a verdict for the defendant, which was overruled, to which an exception was taken. As the evidence was indisputable and conclusive that, as soon as the engineer knew that plaintiff was in a situation of danger, he immediately did all that could be done to avoid the accident by applying the emergency brake, the requested instruction should have been given.”

How a holding by an appellate court such as this sustains the contentions of plaintiffs in error under this heading is beyond our comprehension. Next considering the case of *Dahmer vs. N. P. Ry. Co.*, *supra*, we find in the quotation therefrom the very words which we contend sustain the theory of our case. They are:

“The duty imposed by it (the Doctrine of the Last Clear Chance) is, . . . , is to avert the injury after the perilous situation is actually discovered.”

Bearing in mind the rule just quoted let us for a moment consider the allegations of paragraph VI. of the amended complaint (Tr., pp. 4-5) which are:

VI.

“That on the morning of the 5th day of November, 1912, at about the hour of four o'clock, the said David Clement, Jr., was driving a pair of horses and riding in an enclosed milk-wagon, which was being drawn by said horses, going in a northerly direction on Montana Street, a public street in the incorporated city of Butte, Montana, toward and near the intersection of the defendant Chicago, Milwaukee and Puget Sound Railway Company's tracks and said Montana street (said crossing being near Greenwood Street in said city), and was not observant of the approach of a train which was running along said track in a westerly direction—the engine being under the control of the said J. E. Woods and said Chappel and being used at the time for switching purposes in the yards of the said Chicago, Milwaukee and Puget Sound Railway Company; that the said David Clement, Jr., was coming directly within the way of the said approaching train; *that the said engineer and the said Chappel did see the said David Clement, Jr., or*

by the exercise of ordinary care could have seen him, coming directly within the path of the said engine, and did see or by the exercise of reasonable care on their part, could have seen, that the said boy was in danger of being struck by the said engine, and that the boy was unobservant of the approach of said engine; that the defendants then, after so seeing the boy in danger, negligently and carelessly drove said engine against the vehicle in which the said David Clement, Jr., then and there was, without giving him any warning of the approach of said train and without lowering the gates which were at the said crossing, and by reason of the negligent management and operation of said engine, the said Clement boy was dragged by the same over and along the ground and over and along the railroad track for a great distance, and was drawn and dragged under the wheels of said engine, and the same was then and there run and driven over him, whereby he was crushed, maimed and injured, from which injuries he thereafter died.” (Italics ours.) (Trans., pp. 4-5.)

The allegations of the amended complaint just quoted can hardly be said not to allege an actual discovery of the boy in a place of danger. The words used go further than is required by any of the authorities; it is stated that the engineer and foreman of the engine crew saw the boy coming into a place of danger without observing his danger and they “did see” that the boy was in danger of being struck and seeing him in such danger negligently and carelessly drove the engine against him, etc. Considering these allegations a little further it will be seen that it is charged that the engine was not only driven against the boy but it was so negligently managed and operated that he was dragged and drawn for a great distance over and along the ground and also drawn and dragged under the wheels of the engine and the engine was

run over him *whereby* he was crushed, maimed and injured, from which injuries he thereafter died. In other words not only the driving of the engine against the wagon containing the boy after he was discovered in a place of peril but it is also alleged that the dragging and drawing of him over the ground after the striking of the wagon caused the injuries of which he died. Counsel for plaintiffs in error seemingly overlook this last feature throughout their brief, and for that reason emphasis is laid upon those latter allegations, as defendant in error has always maintained that the injuries were inflicted not only at the time of the first impact between the engine and the wagon but also after the engine had drawn and dragged the wagon containing the boy over and along the ground and track, and when the wheels run over him.

The Doctrine of the Last Clear Chance has many times been the subject of decisions by the Supreme Court of Montana, and the following cases are some of them:

Neary v. N. P. Ry. Co., 37 Mont. 461; 97 Pac. 944.

Yergy v. H. L. & Ry. Co., 39 Mont. 213; 102 Pac. 310

Neary v. N. P. Ry. Co., 41 Mont. 480; 110 Pac. 226.

Dahmer v. N. P. Ry. Co., 48 Mont. 152; 136 Pac. 1059.

Melzner, Admr., v. N. P. Ry. Co., 46 Mont. 162; 127 Pac. 146.

This Court has very recently upheld this wholesome doctrine in the case of Great Northern Ry. Co. vs. Harman, 217 Fed. 959, where the court holds that a trespasser is entitled to the benefit of the doctrine, saying:

“A cause of action arose in his favor, if the defendant actually knew of his peril and thereafter failed to exercise ordinary care to avoid injuring him; and the plaintiff’s

contributory negligence cannot defeat the action, if it can be shown that the defendant might by the exercise of reasonable care and prudence have avoided the consequences of that negligence.”

It is respectfully submitted that the allegations of the complaint are sufficient to state a cause of action.

II.

LEADING QUESTIONS TO WITNESSES.

It may be preliminarily observed under this heading that counsel for plaintiffs in error have not complied with Rule II. of this Court by failing to set forth the substance of the testimony objected to. This of itself should be sufficient reason for not considering the questions raised. However, we have taken the trouble to look back into the transcript for the purpose of ascertaining what answers were given to the questions which counsel call leading and which they claim were prejudicial to plaintiffs in error. The answers given to these questions were directly in accord with the testimony throughout the case, and consequently cannot be said to be prejudicial. Indeed, it is always within the discretion of the trial court to permit questions of that character and counsel wholly fails to show the slightest abuse of discretion on the part of the trial judge.

III.

CONCURRENT NEGLIGENCE.

Plaintiffs in error attempt under this heading to invoke the rule of concurrent negligence, but we respectfully submit that the rule of concurrent negligence has nothing to do in the con-

sideration of the case at bar. The complaint is based upon and the case was tried upon the theory of the Doctrine of the Last Clear Chance. It is alleged that the engineer and foreman of the engine crew discovered the deceased in a place of danger unobservant of the approaching train. (Tr., pp. 4-5.) The evidence introduced on the part of the plaintiff was abundant to show that the engineer and foreman did so see the deceased. The witness Willoughby testified: "This man who jumped off the engine when it was approaching the crossing I saw give a signal, of course, to the engineer (Tr., p. 20, ll. 4-6); "when I saw this man jump off the engine with a light, the head of the train was possibly forty, forty-five maybe fifty feet from the wagon." (Tr., p. 33, ll. 15-18.)

The witness Chappell testified: The milk wagon was 140 feet south of the crossing when I first saw it; I was on the engine about 340 feet from the crossing; I watched the wagon up to when I was about 150 or 200 feet from the crossing and then gave the engineer a slow signal to get his train under control; when I was 75 or 100 feet from the crossing I gave the engineer a positive signal to stop; I jumped off the engine when I was about 30 feet east of the crossing; the horses heads were then just coming on the track; the train was then going five or six miles an hour when it struck the wagon. (Tr., pp. 49-50; 61-64.)

The engineer, Woods, testified: I first saw the rig when I was about 200 feet from the crossing; they claim by measurement it was 300 feet; the wagon was about 175 feet from the crossing; when I saw there was a possibility that the driver would not stop his team I threw the air brake into emergency when I was 75 feet from the crossing and we hit

the wagon after that. (Tr., pp. 106-107.) I saw the team plainly from the time I first got past the house until it struck the track. I watched it all the time. I noticed that there were no efforts made by the person driving the team to get out of the way from the time I saw it until I struck it. (Tr., p. 110.)

The allegations as to the discovery of the deceased in a place of danger are ample and the evidence that he was so seen by the men in charge of the engine is uncontradicted.

In the case of *Yergy v. Hel. L. & Ry. Co.*, 39 Mont. 213; 102 Pac. 310, which is a case on all fours with the case at bar, the Supreme Court of Montana said:

"We shall assume for the purposes of this decision, that Mr. Yergy was negligent in placing himself in a situation of peril. It is not a violent inference that he was asleep in his buggy up to a moment just prior to the collision. The testimony of the motorman is, however, to the effect that he saw deceased, and appreciated his peril, when the car was 40 feet south of Lyndale Avenue. He then sounded the gong. Edgerton testified that the car was 50 to 100 feet from the crossing when the gong first sounded; while Bickel testified that he heard the sound when the car was 90 feet south of the crossing, and Mrs. Wise said she heard it when the car was 200 or 300 feet from the point of collision. Peterson testified that the speed of the car was 8 miles per hour, and plaintiff's testimony tended to show that, going at that rate of speed the car could have been stopped in the space of 20 feet. This testimony, which it was the right of the jury to believe, furnished ample basis for the application of the doctrine of last clear chance before the moment of collision."

The Supreme Court of Montana has passed upon the question of last clear chance many times.

Neary v. N. P. Ry. Co., 37 Mont. 461; 97 Pac. 944.

Neary v. N. P. Ry. Co., 41 Mont. 213; 110 Pac. 226.

Dahmer v. N. P. Ry. Co., 48 Mont. 152; 136 Pac. 1059, and also the decision on rehearing in the same case, 142 Pac. 209.

Melzner v. N. P. Ry. Co., 46 Mont. 162; 127 Pac. 146.

This court in the case of Great Northern Ry. Co. v. Harman, 217 Fed. 959, citing many excellent cases, held that the question as to whether or not the defendant had the last clear chance to avoid the accident was one for the jury. So in the case at bar the trial court was clearly right in allowing the case to go to the jury under the evidence and permit the jury to say whether or not under the circumstances of the case the plaintiffs in error had the last clear chance to prevent the accident. In the Yergy case, *supra*, the evidence was no stronger than the case at bar. There the evidence showed that the motorman saw the deceased at least 40 feet before he struck the buggy in which Yergy was riding and that the car could have been stopped within twenty feet. In the case under consideration the engineer himself says he saw the milk wagon two or three hundred feet before the collision occurred and that when the engine was seventy-five feet from the crossing he threw the air brakes into emergency. The evidence showed that the train could have been stopped, when traveling at the speed shown within a distance of fifteen feet (testimony of Groff, Trans., p. 85; testimony of Ury, Trans., p. 93). The witness Rainey said it could be stopped within thirty feet (Tr., p. 103). "This testimony," in the words of the Supreme Court of Montana last above quoted, "which it was the right of the jury to believe, furnished ample basis for the application of the doctrine of the last clear chance."

It seems to us that further argument of the doctrine of the last clear chance in this brief would be a work of supererogation. Your Honors have most carefully considered it before and have followed the rule and most properly applied it many times. The cases heretofore cited lucidly explain the rule, if indeed any explanation, in this enlightened age, is needed. The whole trouble with counsel for plaintiffs in error seems to be that they cannot differentiate between cases in which the doctrine was never invoked or when invoked not sustained by proof, and the cases in which this Circuit and the Supreme Court of Montana have carefully expressed the rule. In this connection we beg leave to call the attention of the Court to the fact that counsel for plaintiffs in error merely cite a mass of cases from other jurisdictions that are not applicable.

In closing this subdivision of our brief we trust we may be pardoned for citing one more case, but it is such a complete answer to the argument of counsel for plaintiffs in error that we call it to Your Honors' attention. It is:

Teakle v. San Pedro L. A. & S. L. R. Co., 32 Utah 276; 90 Pac. 402; 10 L. R. A. (N. S.) 486.

In this case the facts were very similar to the case at bar; deceased was struck, fell under a car the engine was pushing and was crumpled up and crushed by the ash pan of the engine after the car passed over him. In commenting upon the claim put forth by the railroad company, the same as is done in this case, that the deceased's contributory negligence precluded a recovery, the Supreme Court of Utah held that the doctrine of last clear chance applied, saying:

“When the deceased was struck by the train and rendered helpless, the effect of his antecedent or contributory negligence was spent.”

We will analyze some of the authorities we have been able to obtain and we are sure a careful reading of these authorities will disclose to Your Honors that in nearly every one, either the facts of the case did not sustain the doctrine of the last clear chance or that doctrine was not relied upon by the plaintiff claiming damages.

The first case cited, that of *Dunworth v. Grand Trunk W. Ry. Co.*, 127 Fed. 307, 310, from the Seventh Circuit, the quotation made by plaintiffs in error plainly shows that the facts do not call for an application of the modification of the rule that contributory negligence is a bar to a recovery—the modification referred to being the doctrine of the last clear chance. Hence the citation is valueless in considering the case at bar.

The case of *Southern Ry. Co. v. Carroll*, (4th C. C. A.) 138 Fed. 638, is one in which the recovery was sought by reason of an alleged failure to comply with statutory requirements as to ringing the engine bell and blowing the whistle on approaching the crossing.

The case of *Schofield v. Chicago Ry. Co.*, 114 U. S. 615, is one in which the negligence alleged was a collision on a crossing without a single element resembling the doctrine under consideration here.

The doctrine of the last clear chance is recognized in the case of *Ill. Cent. Ry. Co. v. Ackerman*, 144 Fed. 959, but the

evidence did not show that the employees of the railroad company ever saw deceased in a place of danger, hence the rule was held not to apply.

The deceased, for whose death the action was brought, in the case of *C., M. & St. P. Ry. Co. v. Clarkson*, 147 Fed. 397, was never seen by the engineer or brakeman on the train until after he had been struck. Indeed, the impact of the car with deceased caused the engineer to stop and it was found upon investigation that Clarkson was under the car, and no discovery in a place of peril was either alleged or proven.

The case of *St. Louis & S. F. R. R. Co. v. Summers*, 173 Fed. 358, expressly recognizes the doctrine of last clear chance but holds after summarizing the evidence, the following:

“This evidence, and such evidence as this, is too vague and uncertain, especially when taken with that of the four other witnesses to the accident, which give no such account, to establish any state of peril on the part of Magar which would be reasonably observable by the engineer in charge of the train.”

The evidence on which this holding was had is entirely different from that in the case at bar, as a most casual reading of the decision will demonstrate.

The case of *Colorado & S. Ry. Co. v. Tucker*, 173 Fed. 605, was not presented upon the theory of the last clear chance but upon failure to give signals.

Plaintiffs in error claim the case of *Ill. Cent. R. Co. v. Nelson*, 173 Fed. 915, to be strikingly parallel, and to show that it is state “there is, to be sure, no discovery of David Clement, Jr., in time or at all,” and then they indulge in disparaging

remarks concerning the plaintiff's witnesses who testified as to the distance Woods could have stopped the train. They apparently overlook the testimony of Woods concerning David Clement, Jr., in a place of peril. Woods testified: "When I saw there was a possibility that the driver would not stop his team, why I threw the brake valve into emergency; I got the emergency into position about seventy-five feet from the crossing." (Tr., p. 107.) The jury at the trial having accepted the testimony of plaintiff's witnesses that Woods could have stopped the train within fifteen or thirty feet under the circumstances, the question is decided and not open to debate.

Yergy v. Hel. L. & Ry. Co., *supra*.

In the Nelson case, Henry, Nelson's decedent, was knocked prostrate with the impact of the engine, and the court said he might have been killed then, but David Clement, Jr., received only one wound that caused his death, to-wit, the crushing of the head; the first blood was found fifty feet or more from the crossing, the first members of the body ninety feet or more from the crossing and the body something over one hundred feet. The crushing out of the boy's life was when the wheel of a car passed over it ninety or one hundred feet from the crossing. How can such facts as we have in the case at bar make it one parallel with the Nelson case, *supra*?

Rather than further weary the court with analyzing each of the other cases to show wherein they do not apply to the case at bar we respectfully submit that a most casual reading of each and every one will disclose that they are not in point. Suffice it to say that the case of Iowa Central Ry. Co. v. Walker, 203 Fed. 685, has been discussed fully in subdivision I. of this brief and the remaining cases are either ones in

which the doctrine of last clear chance was never invoked at any stage of the proceedings or they are cases in which under their facts there was lacking the element of discovery in a place of peril and no failure to use every precaution possible to avert the injury existed.

Plaintiffs in error have failed to distinguish the case at bar from the principles of the cases they rely upon. The point upon which most, if not all of the cases cited by plaintiffs in error, turn is that the negligence of plaintiff continued up to the very moment the injury was inflicted. In the case at bar, it can hardly be said for an instant that David Clement, Jr., was acting negligently during any portion of the time that he was being pushed and dragged along the ground and track, either in the wagon or when he fell out and was rolled and dragged by the wheels of the engine and later run over by the wheels of the cars that passed over his body, eventually crushing his head. His negligence, under the authorities cited from the Supreme Court of Montana and this Court, ceased at the time he got upon the track, and the concurrence ceased there. The engineer, Woods, states that when he saw there was a possibility the driver would not stop he threw the engine into emergency at a point distant 75 feet from the crossing. It is most respectfully submitted that the failure of the engineer to stop the train after he saw Clement in a place of peril and the rushing down upon him with the train, colliding with the wagon and shoving it 250 feet beyond the point of contact with the wagon, traveling 325 feet in all after discovery, were all acts of negligence which occurred after David Clement, Jr., was discovered in a place of peril, and the judgment should be affirmed.

Just one word more as to the space in which that train, running at a rate of five or six miles an hour, could have been stopped in. The jury undoubtedly believed, as they had a right to believe, that the testimony given by plaintiff's witnesses was true and that the train could have been stopped within fifteen or thirty feet. As has been well said by an eminent trial judge before whom we have practiced, a jury does not have to believe a thing merely because someone has testified to it, and a jury should judge things not by some unknown or mysterious rule, but as men of common sense. So it is no wonder the jury preferred to believe the witnesses for defendant in error rather than those hypothetical gentlemen who, after indulging in dissertations on the co-efficiency of friction, said it would be a distance of all the way from one to two hundred feet, after an emergency application of the brakes before the train in question could be stopped. A reading of many of the cases cited in the briefs in this case will show that in hardly any was there such a thing as a claim that it took such a remarkably long distance in which to stop a train going at six miles an hour. In the case of *Neary v. N. P. Ry. Co.*, 97 Pac. 946, 37 Mont. 461, in the course of the opinion the Supreme Court of Montana said:

“This train consisted of nine cars and was about 600 feet in length. By the application of the air brake, such a train could be stopped within 250 or 300 feet when going at the rate of 25 or 30 miles per hour. If going at the rate of 6 miles per hour, it could be stopped within a distance of 6 feet.”

So, after all, the remarks of counsel for plaintiffs in error trying to discredit the testimony of the witnesses who said it

could be stopped within fifteen or thirty feet are wholly uncalled for. The negligence of plaintiffs in error in failing to stop the train in time to avert the accident after the discovery of deceased in a place of peril is conclusively shown by the fact that the train ran a distance of 325 feet after the discovery. Woods says he applied the emergency 75 feet before he struck him and Glover testifies that by actual measurement the wagon was 255 feet from the crossing. (Tr., p. 43.)

IV.

INSTANTANEOUS DEATH.

Under this heading, plaintiffs in error attempt to show by their version of the evidence that David Clement, Jr., died instantaneously. After considering their argument briefly, we will show that the trial court did not err in refusing a directed verdict for plaintiffs in error or entering a judgment on the verdict returned by the jury.

The first case cited in the brief of plaintiffs in error, Railroad Co. v. Pendergrass, 69 Miss. 425, is one that unfortunately we have not access to. A reading of the quotation, however, on page 37 of the brief shows that the facts were different from the case at bar in that the Mississippi court says the deceased was run over and ground to pieces. There evidently was no pushing and dragging of deceased along and over the track for a distance of from fifty to one hundred feet as Clement, Jr., was. Hence the case is one that can hardly be said to be in point.

The case of Dillon v. Great Northern Ry. Co., 38 Mont.

485, 100 Pac. 960, has no application to the case at bar, for the reason that the opinion shows that the case was tried upon an agreed statement of facts, which among other things stated:

“and by reason of said collision, the said Thomas Dillon was instantaneously and immediately killed, and *did not live or survive for a second of time after said accident,*”

(Italics ours.)

We have no such condition of the evidence in the case under consideration. Indeed, the Dillon case, *supra*, was based upon Sections 5251 and 5252 of the Revised Codes of Montana of 1907, while the case at bar is brought under Section 6494 of said Codes.

The case of *Lobenstein v. Whitehead & Kales Iron Works*, 146 Mich. 294, cited by counsel for defendant in support of their contention, that the plaintiff died instantaneously, was brought under what was known as the “Death Act” of the State of Michigan, and not under a survival statute like the one under consideration in the case at bar.

The evidence adduced in the *Lobenstein* case was as follows:

“Q. Was he dead when you went down? A. No.

Q. How long did he live? A. Why I could not tell you how long he lived.

Q. How do you know he was alive? A. He was down there breathing, and he must have been alive.

Q. Was he conscious? Could he talk? A. No, he could not talk.”

Defendant's attorney:

Q. You know he lived about two hours after that, don't you? A. I don't know how long he lived.

Thereupon a motion for a directed verdict was made by defendant upon the ground that the defendant did not die instantly, and the Supreme Court of Michigan said:

"Upon the question of whether death was instantaneous within the meaning of that term and referring to the manner in which the question was treated by the trial court we are of opinion that the court would not have been warranted in directing a verdict for the defendant upon that ground."

We take it that the court merely meant that it was a question for the jury.

This "Death Statute" in Michigan is in no wise similar nor is the cause of action granted by it like that given by Section 6494 Revised Codes of Montana. And a most casual examination of the decisions of the Supreme Court of Michigan will show that that court, appreciating the fact that instantaneous death was almost an unheard of occurrence, has held that deaths occurring many minutes, hours and even a day after an accident were instantaneous deaths.

The case of *West v. Detroit*, 123 N. W. 1101, was likewise under the Michigan Death Statute, and is not applicable.

The case of *Ely v. Detroit United Ry. Co.*, 127 N. W. 259, was brought on two counts, one under the death and one under the survival statute. The court merely held that there was error in compelling plaintiff to elect under which count a recovery was sought.

The apology of plaintiffs in error for citing the case of *Moyer v. Oshkosh*, 139 N. W. 378, is well offered, for the

reason that the question of instantaneous death was based upon a claim presented to the city in which it is stated that deceased was precipitated into the river and "then and there drowned." The Supreme Court of Wisconsin says this claim was "unhappily worded." The theory of the case is entirely unlike the case at bar and is no precedent for the question under consideration.

The Corsair Case (*Barton v. Brown*) 145 U. S. 335, and the case of *Cheatham v. Red River Line*, 56 Fed. 248, are ones in which the courts held that the sufferings of drowning persons are contemporaneous with death; the Supreme Court of the United States in the Corsair case says too unsubstantial to estimate damages upon.

The case of *Maher v. Boston & O. R. Co.*, 32 N. E. 950, was one in which the question of instantaneous death was left to the jury and the jury found the death to be instantaneous. This is precisely our contention, that the question was properly left to the jury and the jury having necessarily found it was not instantaneous, and there being evidence to support such finding, the judgment should not be disturbed.

Let us next consider the statement of counsel for plaintiff in error that they do not find a great number of reported decisions on the precise point and that the Corsair case is the only instance, so far as they have found, in which the Supreme Court of the United States touched the matter.

The examination we have made of the law discloses not only that there are cases other than the ones counsel for plaintiff in error rely upon, but the great weight of authority is to the effect that the question as to whether deceased was killed instantaneously or not is one for the jury.

Our contention is that David Clement, Jr., was not killed at the crossing when the engine first collided with the wagon in which he was riding, but that he was pushed along in the wagon and fell out some distance from the crossing, was pushed along in the wreck or by the wheels of the engine, ran over by the wheels of the engine, tender, or cars at a considerable distance from the crossing. The testimony shows the first sign of blood was at least fifty feet from the crossing. How any one can argue that he received the fatal injury, to-wit, the crushing of the skull, while he was seated in the wagon, is beyond our comprehension. The finding of the blood, legs, arms and brains in the order mentioned shows that the injuries occurred in that order, after he was thrown about in the wagon and hurled from it some distance from the crossing.

To believe the contention of counsel for plaintiffs in error that the fatal crushing of the skull occurred at the crossing would necessitate attributing to the locomotive almost human acrobatic skill, as his head was certainly several feet above the level of the railroad tracks, and blood would have appeared in the wagon and on the crossing.

This action is the common law action which the minor had for the injuries he received, and which accrued to him at the time of his injuries and remained available to him until the instant of his death, and which the administrator of deceased minor now seeks to prosecute.

At common law such a right of action literally died with the decease of the injured party.

But section 6494 Revised Codes of Montana provides that

an action or cause of action shall not abate by the death of a party, etc.

Melzner v. Northern Pac. Ry. Co., 127 Pac. 148.

The only questions then in this case are: Was the death of David Clement simultaneous with the injury, and was the evidence in this case sufficient to warrant the jury in finding under proper instructions from the court that the death was not instantaneous?

No error is predicated upon any of the instructions given the jury by the trial Court and consequently they are presumed to have stated the law applicable to the facts in this case correctly.

In the case of Whitford v. Panama Ry. Co., 23 N. W. 486, Judge Comstock sensibly declared:

“The death may be sudden; in common language, instantaneous, but in every fatal casualty there must be a conceivable point of time, however minute, between the violence and the extinction of life. That period may be a year, or it may be less than the shortest known division of time.”

The remark, a simple recital of an obvious fact of science, is important in that it signifies that the legislature could not have meant to pass a statute which, as is contended, means that a recovery should not be had in a case which the accepted truths of science show never does, in fact, occur. The Supreme Court of South Carolina likewise, though saying the statute was a survival statute, held in Price v. Richmond R. R. Co., 26 Am. St. Rep. 700, that it permitted a recovery whether the death was instantaneous or lingering.

Reed v. Northeastern R. Co., 16 S. E. 289.

In Kentucky a like conclusion was reached.

Givens v. Kentucky C. R. Co., 12 S. W. 257.

The Supreme Court of Iowa has passed upon the question here involved in Kellow v. Central Iowa Ry. Co., 23 N. W. 740, saying:

“The finding is that his death was of the nature commonly known as “instant death.” A death is not necessarily instantaneous in fact because it is of that nature. If the injury which caused the death is necessarily fatal and death results in a few moments from it, it would no doubt be commonly called instant death; but as the person survived the injury for that brief period it cannot be said that death was instantaneous. The evidence shows that Carter survived the injury for a few moments.”

On a rehearing of this case it was said:

“We have examined the evidence in the record, and are satisfied that without conflict it establishes the fact substantially as stated in the opinion. It shows beyond controversy, we think, that the death was not simultaneous with the injury. We concede that the time between the two occurrences was brief, perhaps not to exceed three to five minutes. Our holding on the question considered is based, however, not on the length of time that Carter survived the injury but upon the fact that he lived after it occurred.”

Kellow v. Central Iowa Ry. Co., 27 N. W. 466.

In the case of Worden v. Humeston & S. R. Co., 33 N. W. 630, the Supreme Court of Iowa held it made no difference whether the injured died instantly or not.

See also Connors v. Burlington C. R. & N. Ry. Co., 32 N. W. 465.

A very interesting case upon the subject under discussion

is that of *Naurse v. Packard*, 128 Mass. 307. In this case the deceased was last seen alive in the mill ten or fifteen minutes before the accident; three-quarters of an hour after the accident his dead body was found twenty feet below where he had last been seen, with no marks of injury upon it, surrounded by loose grain over his head. There was expert evidence that he died of suffocation and that a person so situated would retain consciousness from three to five minutes. Held that the jury were warranted in finding that the death was not instantaneous.

In an action for injury to plaintiff's intestate by suffocation in a steamer in which the hatch had been closed to check fire, from the position of the body it was to be inferred that his death was not instantaneous and that he lived in a state of conscious suffering for a greater or less time.

Held to be proper case for the jury.

Pierce v. Cunard S. S. Co., 26 N. E. 415.

Carolina C. J. Ry. Co. v. Shewatter, 161 S. W. 1136.

Belding v. Black Hills R. Co., 3 S. D. 369; 53 N. W. 750.

Brown v. Chicago Ry. Co., 77 N. W. 748; 78 N. W. 771; 44 L. R. A. 579; 70 N. W. 170; 37 L. R. A. 333.

A case almost on all fours is the case of *Martin v. Boston & Maine R. R. Co.* (Mass.), 56 N. E. 720.

Plaintiff's decedent was in defendant's employment as a brakeman and switchman, at the time of the accident; decedent attempted to descend from a car on the end of the train when it was about 270 feet from and backing towards the switch, and his feet caught about two feet from the ground, until the car had gone twenty feet, when his foot was loosened

and after being pushed one hundred sixty feet further he was run over and instantly killed. There was evidence that the train was going at a rate of four or five miles an hour and that a train of its kind should be stopped within the length of a car and a half.

The court said :

“The plaintiff concedes that if there was not conscious suffering the action, which is brought under the Employer’s Liability Act, by persons dependent on the deceased cannot be maintained. It seems to us plain that there was conscious suffering, although the second in which the deceased was killed was separated, as a point of time, from the second in which he fell from the car, the accident was one accident from its beginning to its swift and unfortunate end. The same causes were operating all the time, which was exceedingly brief, only a few seconds. We do not see how the second in which the deceased was killed can be separated from the second in which he fell, and from the seconds which intervened between that time and the death, so as to say death was without conscious suffering.”

Another case in point is that of *Finnigan v. Fall River Gas Works*, (Mass.), 34 N. E. 523.

This was a case where deceased met his death from becoming asphyxiated.

The court said :

“There was evidence for the jury, whatever may be thought of its weight, that the deceased had a period of conscious suffering before death. One of the doctors testified to that effect. To be sure he had not had any experience of this kind of asphyxiation personally or with patients, but his general competency as an expert seems not to have been questioned. . . . We see no suffi-

cient ground for saying that the testimony admitted in this case could be treated as furnishing no evidence of the fact."

In the case of *St. Louis I. M. & S. Ry. Co. v. Stamps* (Ark.), 104 S. W. 1116, the court said:

"The next point raised is that there was instant death, and hence compensation for pain and suffering prior to death cannot be sustained. The facts testified to by eye witnesses were that the steam cylinder of the locomotive struck Mr. Kirby on the hip and knocked him from the bridge, and he fell on an iron girder parallel with the bridge; that he struck this girder with some force, enough to make him bounce, and then he dropped his flag, which fell on one side of the girder and he on the other; and that as he fell from it, he drew up his hands close to his breast. Another witness saw his left arm raised as he was falling. The bridge was twenty or twenty-five feet above the water. The river was swift and deep at this point. He was not seen after his fall. The train was making so much noise that it is not known whether he made an outcry or not. When the body was found some two months later there were indications of bruises on the head. For a recovery to be had for pain and suffering there must be some appreciable interval of conscious suffering after the injury and before the death. *G. L. I. M. & Son. Ry. Co. v. Dawson*, 68 Ark. 1; 56 S. W. 4."

"In *Taxarkan Gas Co. v. O. R. R.*, 59 Ark. 27; S. W. 66; 43 Am. St. Rep. 215, it was said:

" 'That the struggles of deceased were of the briefest character. He cried out twice, and his hands were burnt and drawn up by wires. He died almost instantly; yet in that case a recovery for conscious pain and suffering was sustained.' There is a conflict in the authorities as to whether in case of death by drowning there can be a recovery for conscious pain and suffering. See *Railroad Co. v. Dawson*, *supra*. It cannot be said, in view of the evidence above detailed, that there was not a substantial

interval of conscious mental and physical suffering from the time Mr. Kirby was struck by the locomotive on the bridge until he met his death in the river below.”

Another case very similar to the one at bar is the case of *St. Louis, I. M. & S. Ry. Co. v. Dawson* (Ark.), 56 S. W. 46, in which plaintiff's decedent while crossing the railroad track was struck by a locomotive, run over and killed. She was between six and seven years of age. She was seen on the track a short distance in front of the engine, but no witness saw her at the time she was struck. After the train passed over her, she was discovered lying on the track. She had been pushed along the track and looked like a bundle of rags. One of her legs have been cut off above the knee, and a portion of the entrails protruded, and the skull was broken. Those who reached her first testified that she did not move, and did not appear to be conscious, though she was seen to breathe. Some one called her “Marie” but she never spoke. She gave a couple of gasps and in a moment or so was dead.

The court said:

“We are also of the opinion that a right of action survived to the personal representative; for the survival of the action depends upon whether the injured child lived after the act constituting the cause of action, and it is not material whether she was conscious or not. If she lived after her right of action was complete, this right, which she possessed, passed by virtue of the statute, to her personal representative.”

Davis v. Railway, 53 Ark. 123; 13 S. W. 801; 7 L. R. A. 238.

Hollenbeck v. Railroad Co., 9 Cush. 478;

Mulchahey v. Car Wheel Co., 145 Mass. 281; 18 N. E. 106.

The *Corsair* case cited by counsel, 12 Sup. Ct. 949; 36 L. Ed. 727, did not touch upon the point here involved and nowhere did the court attempt to go farther than to determine that the point of time between the injury and the death was so short that no recovery could be had for conscious suffering. The question here involved is, did the action survive?

In the *Corsair* case a person was drowned. The boat struck the bank of the Mississippi and in ten minutes sunk. It was contended that the deceased suffered great mental and physical pain and shock and endured tortures and agonies of death.

The court said:

“Had she suffered bodily wounds and bruises from the results of which she lingered and ultimately died it is possible that her sufferings during her illness would give a separate cause of action. . . . Her fright for a few minutes is too unsubstantial a basis for a separate estimation of damages.”

Reviewing briefly the evidence in this case we find that the train was moving at the rate of about five or six miles an hour (Tr., p. 50); that when the wagon was struck it was pushed along the track approximately 250 feet (Tr., p. 43). The body of the plaintiff's decedent was approximately 75 or 145 feet west of the crossing (Tr., pp. 29, 54), between the tracks (Tr., p. 30). When the boy was picked up he was merely gasping a little, frothing at the mouth as if in his last struggle for life (Tr., p. 53). The hand of the boy was picked up ten feet east of the body (Tr., p. 54). Blood was found on the track between the place where the arm was picked up and the body. The boy was riding in an enclosed milk wagon. The wagon was caught on the foot board run-

ning along the rear end of the engine, and across the rail, and slid along on the rail ahead of the engine (Tr., p. 28).

The case of Melzner, Admr. of Omer Haddox, v. Northern Pacific Ry. Co., 127 Pac. 148, was a case almost on all fours with the case at bar. In that case the Supreme Court of this state said:

“We preface our remarks by saying that we think the evidence sufficient to show that Omer Haddox survived his injuries for an appreciable length of time, and therefore had a cause of action for damages for the injuries sustained, assuming for the present that his injuries were caused proximately by the negligence of the defendant.”

The facts in this case are not set forth in the decision, but we quote from the record on appeal as follows:

“He was struck by the pilot beam. I should judge it struck him in the back. He seemed to roll like a ball through the air; he was away clear off the ground; after the engine hit the boy I ran down where he lighted; after I got there the boy just gasped once or twice—kind of opened his mouth and closed it.”

In the case of Beeler v. Butte & London Copper Co., 110 Pac. 531 (Mont.), the Supreme Court of this state said:

“On the morning of the day above referred to, Edwin Beeler, a pumpman in appellant’s employ, was sent by one O’Neal, his boss, to prime a pump at the ‘Four Hundred’ and after that proceed to the ‘Six Hundred’ and shut off the steam line there. He proceeded to the ‘Four Hundred,’ was there about 15 minutes, primed the pump, passed some remarks with one Simmons, took the cage, rang for the ‘Six Hundred’ and descended. About half an hour after this O’Neal, finding the steam line still open, signaled from the bottom of the shaft for the cage, and, not receiving it, he ascended the shaft by means of the ladder, arrived at the ‘Six Hundred,’ and there found

Beeler dead, bound tight between the lower edge of the north wall plate and the upper edge of the bottom of the cage, the floor of the cage being about four inches up on the wall plate. The cage was rigid, and it was necessary to lower it to remove the body; 'it seems to have him by the breastbone and the lower short ribs, square . . . he was bound in that tight that there wasn't a tremor in cage at all.' His body was held almost erect, his head thrown slightly backward, the hat still on it; both hips were below the floor of the cage but the left leg was drawn up so that the kneecap was above the floor of the cage; his clothing was drawn or bunched sharply upward; he had been dead some time. There was no blood, except a little froth from the mouth, nor marks of injuries except crosswise at the point of the breastbone, which were not cuts but a crush; the lower ribs were broken at that point; there were no wounds on the legs or around the region of the hips, front, or rear or sides. The internal organs of the lower abdomen, everything in the abdominal cavity seemed to be pushed up. No one saw the accident or heard any outcry. At the time of the accident Beeler was 27 years old, in good health, sober, steady, and industrious, competent in his business, capable of earning \$150 a month, and with a life expectancy of 36 years. The injuries sustained by him were such as to totally incapacitate him and to cause his death. It does not appear that death was instantaneous, but, on the contrary, we think there is sufficient competent evidence in the record to support the conclusion that he lived an appreciable time after the injuries were sustained."

Counsel say that Chappel's testimony was contradicted and that he was impeached, but our contention is that while the jury might disbelieve the evidence given by Chappel, it was a question for the jury, and the Court should not say as a matter of law where there is a conflict in the evidence that the jury could not believe one witness in preference to an-

other, no matter how much the Court might be impressed with the truth or falsity of it. The evidence shows that the wagon was pushed along ahead of the engine, and the boy must have dropped out on the track and was caught up, apparently by the wheels and was dragged some distance on the track. Apparently an arm was taken off at one time, a leg at another, then another leg, and lastly the head crushed. That was the order the various parts of the body were found in.

The Supreme Court of Massachusetts in *Hollenbeck v. Berkshire*, 9 Cush. 478, said:

“We think the accruing of the right of action does not depend upon intelligence, consciousness or mental capacity of any kind on the part of the sufferer. A right may accrue by operation of law to one in extremis, when it requires no act or assent or even consciousness on his part. Should a person who is heir of his father be in the lowest condition, but still heir at the moment of the death of his father, the descent would be cast on him, although he might never know it.”

Quoting again from a Massachusetts court:

“Instantaneous means generally occurring in an instant, or without any perceptible duration of time. . . . If a blow upon the head produces unconsciousness and renders the person injured incapable of intelligent thought or speech or action, and so remains for several minutes and then dies, we think his death may very properly be considered immediate, though not instantaneous. Of course an instantaneous death is an immediate death, but we have not supposed that an immediate death is necessarily and in all cases an instantaneous death. . . . Such a discrimination may be regarded by some as excessively exact or nice, and therefore hypercritical, but in stating legal propositions it is impossible to be too exact, *Tulley v. Pittsburg R. Co.*, 134

Mass. 499. In paraphrasing an opinion from Iowa 'All death is not necessarily instantaneous in fact because it is of that nature. If the injury causing the death is necessarily fatal, and death results therefrom in a few moments, while it would commonly be called an instant death, still if the person injured survives the injury for a brief period, it cannot be said that the death is instantaneous. It is immaterial that the period of time between the injury and death is short. If the injured person survives the injury but for a single moment, the cause of action accrues to him as certainly as if he lives for a month or a year thereafter.'

Kellow v. Cent. Iowa R. R. Co., (Iowa), 68 Iowa 470.

A jury might well say that consciousness is evidenced by the opening and closing of the mouth more often than in any other way. We accept this as a fact, when, at the bed of death, the departing having not sufficient strength to make audible sounds, but are attempting to speak. Whether there is consciousness coupled with bodily injury there is pain and suffering.

In the recent case of Myers v. Pittsburg Coal Co., 233 U. S. 184, the deceased was found lying in the middle of the track with his head toward the motor and his cap upright, the body was badly torn and mangled before the motor car could be stopped; deceased's tongue was found to be moving, but he died shortly from his injuries. A recovery was had in the Circuit Court of Pennsylvania and a reversal had in the Circuit Court of Appeals.

The Supreme Court of the United States said in reversing the Circuit Court of Appeals:

“The opinion of the circuit court of appeals placed the reversal largely upon the want of definite proof as to the manner in which Myers came to his death,—whether by contact with wire, or, if so, whether that merely disabled him or he was only injured or stunned by the fall, was seized with vertigo or other sudden sickness and fell from the car for that reason, or lost his footing by some unexpected movement of the train, or voluntarily got off the car and stumbled and fell upon the track, or became bewildered in the dark, and mistakenly supposed himself to be in a place of safety. The court held that all these situations were more or less probable, and, in the absence of some more accurate means of ascertaining the true condition in this regard, no recovery could be had for the wrongful causing of his death, and that an examination of the testimony brought the court to the conclusion that the jury should not have been permitted to guess as to the proximate cause of death. This question, however, was submitted to the jury and found against the defendant in the trial court. Unless the testimony was such that no recovery can be had upon the facts shown in any view which can be properly taken of them, the verdict and judgment of the district court must be affirmed.

“That there was ample testimony to carry the question of negligence to the jury we have already said, and in any case it cannot be said as a matter of law that there was no evidence tending to show that Myers came to his death by the negligence of defendant in one or more of the ways charged in the petition. Considering the testimony, as it must be considered in determining questions of this character, in appellate courts, in its most favorable aspect to the plaintiff below, we think the jury might well have found, in view of the place at which the body of Myers was found near to the wire, with his cap gone from his head, that he came in contact with that wire and was thrown to the ground, and that he survived from contact with the wire, carrying the voltage which it did, and while in this situation was run over and killed by the approaching motor car, the operator being unable to see his body

upon the track because of the want of efficient light in the entry or in the motor car. We think reasonable men, considering the testimony adduced, might well have come to this conclusion, and that it was error in the appellate court to set aside the verdict for entire absence of testimony upon this subject. In our opinion, the trial court properly left the question to the jury upon testimony which, when fairly considered, might sustain the verdict. See *Humes v. United States*, 170 U. S. 210, 42 L. Ed. 1011, 18 Sup. Ct. Rep. 602.”

This case is undoubtedly the latest expression of the law on this subject and coming from the court it does entitle it to the greatest consideration. The true rule undoubtedly is that the question is one properly left for the jury and by its verdict the jury having found that Clement survived an appreciable length of time, this court cannot set aside the verdict if from any view of the testimony such verdict finds support.

We respectfully submit that the jury could easily have found from the testimony that Clement was even after falling out of the wagon rolled, pushed or dragged along the ground by the wagon as it was fastened on the engine's running board, or by the wheels of the engine or wheels of the car, or all of these.

The trial judge considering the motion for a new trial rightly held under the authorities cited, *supra*, and especially the last one from the Supreme Court of the United States, that if under any view of the testimony the verdict could be sustained it should be. The jury evidently considered and they had a right to do so, that no evidence of the blood was seen for fifty feet from the place of collision; and the finding of the brains beyond the severed arm and legs, was sufficient to

show that Clement, Jr., lived after the collision an appreciable length of time, and the cause of action survived. The living of deceased for the briefest moment is a sufficient survival, and the judgment should be affirmed.

Respectfully submitted,

B. K. WHEELER,
HOMER G. MURPHY,
A. A. GRORUD.

Service of the above and foregoing Brief is hereby acknowledged, and copy thereof received, this 7th day of May, A. D. 1915.

Geo. W. Shelton.
Fred J. Thurman.
A. J. Verheyen.

Counsel for Plaintiffs in Error.

No. 2570

United States
Circuit Court of Appeals
For the Ninth Circuit

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY
COMPANY, a Corporation; CHICAGO, MILWAU-
KEE & PUGET SOUND RAILWAY COMPANY,
a Corporation; J. E. WOODS and M. I. CHAPPELL,

Plaintiffs in Error,

vs.

DAVID CLEMENT, as Administrator of the Estate of
DAVID CLEMENT, JR. Deceased,

Defendant in Error.

Petition for Rehearing

Upon Writ of Error to the United States District Court
of the District of Montana

Filed

NOV 1 1915

F. D. Monckton

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PETITION FOR REHEARING.

Now comes the defendant in error in the above entitled cause, and respectfully presents this, his petition for rehearing in the said cause upon the merits, and submits the following reasons why his petition should be granted:

I

This is an action instituted under Section 6494 of the Revised Codes of Montana, 1907, by the administrator of the estate of David Clements, Jr., to recover for injuries sustained by said David Clement, Jr., and from which injuries he thereafter died, it being alleged in the complaint that said injuries were caused by the negligence of the defendants.

II

It is alleged in the complaint that the said David Clement, Jr., was a strong and able-bodied lad of fifteen years of age, of good capacity for and disposition to work, and would have earned much money after he became twenty-one years of age, and would have enjoyed a long and happy life; and that he lived an appreciable length of time after the accident and that the cause of action has survived to his administrator.

III

The statute under which this action was instituted, Section 6494, Revised Codes of Montana, 1907, gives to the personal representative of the decedent the right to prosecute and maintain the same action that the decedent could have maintained had he lived; that is, not only the right to maintain an action for pain and suffering, when the decedent lived an appreciable length of time after receiving the injuries, but also the right

to maintain an action for any impairment of his earning capacity when the decedent lived an appreciable length of time after receiving the injuries.

Beeler vs. Butte & London Copper Dev. Co., 41 Mont. 465;

Dillon vs. Great Northern Ry. Co. 38 Mont. 485;

Melzner vs. Northern Pacific Ry. Co. 46 Mont. 162;

Keys vs. Valley Tel. Co. 132 Mich. 281;

Oliver vs. Houghton Co. St. Ry. Co. 134 Mich. 367.

IV

On the trial of this action, without objection on the part of the plaintiffs in error, defendants below, evidence was introduced, and considered by the jury, showing the expectancy of life of a person fifteen years of age and the amount of money required to purchase for a person twenty-one years of age an annual income of one hundred dollars per annum.

Witness Fenner, Trans. p. 113.

V

The defendant in error, plaintiff below, also introduced on the trial of this action evidence showing that the decedent lived an appreciable length of time after receiving the injuries which caused his death. The witness Chappel testified, in substance, *that he crossed the drawheads between the engine and the first car and then travelled two car lengths, between 72 and 80 feet, to where he found the boy between the rails underneath the drawheads of the second and third cars, and that when he reached the boy he was gasping a little, frothing at the mouth, as if in his last struggles for life.* This evidence having been apparently overlooked by the court.

Witness Chappel, Transcript pp. 52-53.

VI

The court apparently misconstrued the interpretation placed upon Section 6494, Revised Codes of Montana, 1907, under which this action was instituted. The cases cited by the court in its opinion are based upon statutes where a recovery could only be had for conscious pain and suffering, while the Supreme Court of the State of Montana, in construing the Montana statute, has held that while under that statute, conscious pain and suffering may be included as an element of damage it does not necessarily have to be so included, and a recovery may be had for injuries impairing earning capacity when the person injured lives an appreciable length of time after receiving the injuries.

Beeler vs. Butte & London Copper Dev. Co., 41
Mont. 465.

VII

No evidence whatever was introduced by the defendant in error, plaintiff below, on the trial of this action, for the purpose of showing any pain or suffering by the decedent between the time he received the injuries and the time of his death, the evidence introduced being for the express purpose of showing that the decedent lived an appreciable length of time after receiving the injuries, his expectancy of life and the amount he would have been entitled to recover by reason of the impairment of his capacity to earn money if he had survived his injuries.

VIII

The damages which the jury awarded the defendant in error, plaintiff below, were not for the decedent's pain and suffering between the time the injuries were received and his

death, but for the impairment of his earning capacity caused by the injuries from which, after an appreciable length of time, he died.

IX

The damages awarded having been for the impairment of the decedent's earning capacity and not for pain and suffering, the judgment should have been affirmed.

WHEREFORE, we respectfully ask that a rehearing be granted and that the case be reconsidered upon its merits.

BURTON K. WHEELER,
A. A. GRORUD,
HOMER G. MURPHY,

Solicitors for Defendant in Error.

I, Burton K. Wheeler, one of the solicitors for the defendant in error, do hereby certify that in my judgment the foregoing petition for rehearing is well founded, and that the same is not interposed for delay.

B. K. Wheeler

Of Solicitor for Defendant in Error.

Service of above and foregoing petition for rehearing admitted and copy thereof received this 29th day of October, 1915.

Shelton & Furman

A. J. Verheyen

Solicitors for Plaintiff in Error.

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